111-472

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1245.

JOHN B. ALLEY, APPELLANT,

vs.

ELIPHALET NOTT &c., APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 1884.

SUPREME COURT OF THE UNITED STATES.

JOHN B. ALLEY, APPELLANT,

VS.

ELIPHALET NOTT &c., APPELLEE.

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Supreme Court of the State of New York.

ELIPHALET NOTT, who sues on behalf of himself, and of all others who shall come in and be made parties to this action, and contribute to the expenses thereof,

Plaintiff,

against

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY,

Defendants.

Trial to be had in the City and County of New York.

Summons.

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this Summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, March 2nd, 1883.

HORATIO F. AVERILL,
Plaintiff's Attorney.

P. O. Address and Office, No. 120 Broadway, New York City.

Supreme Court—County of New York.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof.

against

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

The complaint of the above-named plaintiff, who sues as well for all other stockholders of the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company who may choose to come in and avail themselves of the benefits of this action and pay their proportion of the expenses thereof as for himself respectfully shows to this Court,

That he is a stockholder of the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

That he purchased his stock in good faith, and for a valuable consideration.

And the plaintiff further shows and alleges on information and belief:

First. That the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company is a corporation, having been duly created and organized in the month of October, 1881, under and by virtue of the laws of the State of New York, providing for the formation of corporations for mining and other purposes, and with a capital stock of twenty-five million dollars, divided into one million shares of twenty-five dollars each, having its principal office and place of business in the City of New York.

Second. That the individual defendants above named were the Trustees and Directors of said defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company, for the first year after the organization of said corporation, and at the time of the issue and disposition of its stock as hereinafter mentioned.

Third. That soon after the organization of said defendant corporation as aforesaid, the said individual defendants, assuming to act for said defendant corporation, entered into an agreement or pretended agreement with the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to him or to a trustee for him, or him and his associates, as full paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said defendant corporation, amounting to twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars (being all the capital stock of said company except seven shares which were issued for cash) for the consideration or pretended consideration of the conveyance to said defendant corporation of said mining claims and property, and that said mining claims and property were conveyed in form and said stock issued accordingly.

Fourth. That said mining claim and property were of little or no value for mining purposes in the condition in which the same were when conveyed as aforesaid.

That the only working for mines or ores on said property were abandoned a century or more ago, and the shafts or openings were in a great measure filled with earth, debris, mud and water, and the same could only be reopened by a great amount of labor and the expenditure of immense sums of money, and only after such expenditure of labor and money could the presumption of the unproductiveness of said mines arising from the abandonment of such workings be overcome.

That said mining claims and property were not worth the sum of twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars, paid for them as aforesaid, or any considerable proportion of that amount.

That the same were purchased for seventeen thousand dollars from the Mexican owners a short time before the conveyance thereof to the defendant corporation by the person who directly or immediately conveyed the same to said corporation.

That the actual value of said mining claims and property did not at any rate exceed five hundred thousand dollars, and that the market value of same was less than said last mentioned sum, and that twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars was an unfair, excessive and improvident consideration for the conveyance of said mining claims and property.

Fifth. That immediately after the issue of such stock, as aforesaid, a large portion of the same was turned over, by such vendor, to, and received by the individual defendants and their associates, friends, and nominees at a nominal price, which price was less than five per cent of the par value of such stock.

Sixth. That the shares of stock mentioned and referred to in the last preceding paragraph were transferred and delivered to the individual defendants, their friends and nominees, in pursuance of the real scheme devised and agreement made between said vendor and the individual defendants for the sale of the mining claims and property and the issue of the stock of the defendant corporation thereof, or of a further agreement made at the same time; and that thereafter said stock, or the portion thereof turned over to the individual defendants, was disposed of, or might have been disposed of in the market at a large profit.

Seventh. That the individual defendants at the time of the issue and delivery of the stock, and the conveyance of said mining claims and property, well knew, or could and would, with the exercise of due and reasonable care and diligence, have known the condition and value of said property so conveyed to the defendant corporation, and that the market value thereof did not exceed five hundred thousand dollars. They also well knew, or could, with reasonable care and diligence, have ascertained the cost of said property to the said vendor, and that the same was purchased by him with the design and intention of conveying the same to the defendant corporation then organized, or intended to be organized, under the laws of the State of New York.

Eighth. That the individual defendants after the issue of the whole capital stock of the defendant corporation failed and neglected to make a record in the Office of the Clerk of the County of New York, a certificate stating the amount of capital so fixed and paid, as required by the statute under which defendant corporation was organized, and that no such certificate has at any time been filed or recorded in such Clerk's Office.

Ninth. That after the issue and disposition of said stock of the defendant corporation as hereinbefore stated, said corporation was entirely without means to work and improve said mining property, except the sum of one hundred and seventy-five dollars, derived from the sale of the seven shares issued for cash. That the said individual defendants with a view of giving an apparent value to, and enhancing the market value of the stock, made ostensible efforts to work said mines and to extract ores therefrom, and that the result of such operations has been to create an indebtedness on the part of said defendant corporation to the amount of ninety thousand dollars and upwards.

Tenth. That the individual defendants assuming to act on behalf of the defendant corporation by the certificates of stock issued and cir-

culated by them, represented to the public, including this plaintiff, that the said stock was full paid. That such stock, or a large proportion thereof, including the stock now held by the plaintiff, has been sold as full paid stock in the open market, in pursuance of such representations, and has thus passed to innocent holders and purchasers, including the plaintiff.

Eleventh. That plaintiff purchased his stock in the open market, relying upon the representations aforesaid, and thereupon received from the prior holder or holders thereof certificates before that time, duly issued under the sanction of said individual defendants, declaring such stock to be full paid, and accompanied by the usual power or powers of attorney for the transfer of the same. That said plaintiff caused such certificates with such power or powers of attorney to be presented at the office of said defendant corporation, and upon the surrender of such certificate and the proper transfer of such stock on the books of said corporation in pursuance of the by-laws thereof, the said defendant corporation through its proper officers duly issued to the plaintiff, certificates declaring that he was the owner and holder of three hundred full paid up shares in the capital stock of said defendant corporation, that being the number of shares represented by such surrendered certificates.

Twelfth. That the individual defendants have individually received large sums of money, gains and profits from the sale of that portion of the stock of the defendant corporation turned over to them at a nominal price by the vendor of the property as hereinbefore stated. That plaintiff is unable to state definitely the amount received by said individual defendants, and each of them, from the sale of such stock.

Thirteenth. That the individual defendants have not, nor have any or either of them accounted concerning, or paid over to the defendant corporation, the difference between the twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars, represented by the capital stock of the defendant corporation, issued for property as aforesaid, and the real value or market value of the property conveyed to the said corporation in exchange therefor, nor any part of such amount, nor have the individual defendants or either of them accounted for or paid over to said defendant corporation the sums of money, gains and profits received by them or either of them from the sale of the stock of the defendant corporation as hereinbefore stated.

Fourteenth. That four of the individual defendants are still directors of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, and are a majority of the board of directors, and control the same, for which reason said defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company is in no condition to bring and prosecute an action for the relief sought by this action, and neglects to do so, and is for that reason made a defendant in this action, but no personal claim is made against the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

The plaintiff therefore prays, that the individual defendants may be adjudged and declared to be trustees as to the twenty-five million

dollars represented by the one million shares of the capital stock of the defendant corporation, and that they may collectively and severally be adjudged and decreed to account of and concerning such sum. That they may also be severally adjudged and decreed to account of and concerning the sums of money, gains and profits received by each from the sale of the stock of the defendant corporation as aforesaid.

That the value of the property conveyed to said defendant corporation to be determined by this Court, be credited on such accounting as may be just.

That the amount found due on such accounting may be brought into Court and paid to a special receiver, to be appointed by this Court, and disposed of as the Court may direct.

That the plaintiff and other stockholders of such corporation who may choose to come in and share the benefits and expenses of this action, may be paid their proportion of the amount found due on such accounting, after satisfying all prior just claims thereon, and that the plaintiff and such other stockholders and the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company may have such other or further relief as may be just and equitable, with costs of this action, to be paid by said individual defendants.

HORATIO F. AVERILL,
Plaintiff's Attorney.

Office and Post Office Address, 120 Broadway, New York City.

CITY AND COUNTY OF NEW YORK, *ss.:*

ELIPHALET NOTT being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ELIPHALET NOTT.

Sworn to before me this 28th day of February, 1883.
J. ALEX. STITT,
Notary Public (222) *New York Co.*

(Indorsed): Supreme Court. Eliphalet Nott, who sues as well, &c., against Henry Clews and others. Copy—Summons and Complaint. Horatio F. Averill, Plaintiff's Attorney, No. 120 Broadway, New York.

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues as well, &c.,
against
HENRY CLEWS, impleaded with others.

The defendant Henry Clews, by Abbott Bros., his attorneys, demurs to the complaint of the plaintiff in the above-entitled action, upon the ground that it appears on the face of the complaint, that the said

complaint does not state facts sufficient to constitute a cause of action.

ABBOTT BROTHERS,
Attorneys for defendant CLEWS.

Office and Post Office Address, No. 71 Broadway, New York City.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott against Henry Clews, impleaded, &c. Demurrer to Complaint by def't Clews. Abbott Brothers, Attorneys for defendant, Clews, 71 Broadway, New York.

Due service of the within is hereby admitted.

H. F. AVERILL,
March 29, 1883. *Plff's Att'y.*

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues, &c.,
against
JOHN B. ALLEY, impleaded with others.

The defendant, John B. Alley, by Abbott Brothers, his attorneys, demurs to the complaint of the plaintiff in the above-entitled action upon the ground that it appears on the face of said complaint, that the said complaint does not state facts sufficient to constitute a cause of action.

ABBOTT BROTHERS,
Attorneys for defendant ALLEY.

Office and P. O. Address, 71 Broadway, N. Y. City.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott, who sues, &c. against John B. Alley, impleaded, &c. Demurrer of deft. Alley. Abbott Brothers, Attorneys for defendant Alley, 71 Broadway, New York.

Due service of the within is hereby admitted.

H. F. AVERILL,
March 29, 1883. *Plff's Att'y.*

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues as well, etc.,
against
LEE R. SHRYOCK, impleaded with others.

The defendant Lee R. Shryock, by R. H. Spencer, his attorney, demurs to the complaint of the plaintiff in the above-entitled action upon the ground that it appears on the face of the complaint that the said complaint does not state facts sufficient to constitute a cause of action.

R. H. SPENCER,
Attorney for defendant SHRYOCK.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott, who sues, &c.,

against Lee R. Shryock, impleaded, &c. Demurrer to Complaint of deft. Shryock. R. H. Spencer, Att'y for deft. Shryock.

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues as well, &c.,
against
ABIA A. SELOVER, impleaded with others.

The defendant Abia A. Selover, by Abbott Brothers, his attorneys, demurs to the complaint of the plaintiff in the above-entitled action, upon the ground that it appears on the face of the complaint, that the said complaint does not state facts sufficient to constitute a cause of action.

ABBOTT BROTHERS,
Attorneys for defendant SELOVER.

Office and Post Office Address, No. 71 Broadway, New York City.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott against Abia A. Selover, impleaded, &c. Demurrer to Complaint by deft. Selover. Abbott Brothers, Att'ys for defendant Selover, 71 Broadway, New York.

Due service of the within is hereby admitted.

H. F. AVERILL,
March 29, 1883. *Plff's Att'y.*

At a Special Term of Supreme Court of the State of New York held at the Court House in the City and County of New York, on the 4th day of June, 1883,

Present, Hon. Charles Donohue, Justice.

ELIPHALET NOTT, who sues as well, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, Lee R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT and LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

The issues of law raised by the demurrers of the defendants, Henry Clews, John B. Alley, Abia A. Selover and Lee R. Shryock to the complaint of the plaintiff herein having been brought to trial, and Mr. Abbott having been heard on behalf of said defendants in support of said demurrers, and Mr. Betts on behalf of the plaintiff,

It is now on motion of Horatio F. Averill, attorney for plaintiff,

Ordered that the said demurrers be overruled and that the plaintiff have judgment thereon accordingly, with costs; with leave to said defendants demurring within twenty days to withdraw said demurrers and answer the complaint upon payment of costs.

A Copy.

[SEAL.] PATRICK KEENAN,
Clerk.

SIRS:—Within is a copy of an order in the within entitled action this day duly entered and filed in the office of the Clerk of the City and County of New York, at the County Court House in said City.

Dated June 6, 1883.

Yours, &c.,

H. F. AVERILL,

Plaintiff's Attorney.

To ABBOTT BROTHERS, Esqs.,
Attorneys for defendants
CLEWS, SELOVER & ALLEY.

R. H. SPENCER, Esq.,
Attorney for defendant SHRYOCK.

(Indorsed): Supreme Court. Eliphalet Nott, who sues as well, &c., against Henry Clews and others. Copy. Order that demurrers be overruled, &c. Horatio F. Averill, Attorney for Plaintiff, 120 Broadway, N. Y. City.

Service of copy and entry of same admitted June 7, 1883.

A. BROS,

Att'ys for def'ts CLEWS, SELOVER and ALLEY.

To ABBOTT BROS., Esqs.,
Attorneys for Defendants,
CLEWS, SELOVER and ALLEY.

Supreme Court of the State of New York.

ELIPHALET NOTT, who sues on behalf of himself and all others who shall come in and be made parties to this action and contribute to the expenses thereof *against* HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT and LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.	Interlocutory Judgment, June 9th, 1883.

The above-entitled action having been duly brought on for trial upon the issues of law raised by the demurrers of the defendants, Henry Clews, John B. Alley, Abia A. Selover and Lee R. Shryock to the complaint herein, at a Special Term of this Court held in the City and County of New York on the first Monday of June, 1883, Hon. Charles Donohue, presiding, and a decision and order having been duly made and entered, directing that said demurrers be overruled, and that plaintiff have judgment thereon, with leave to said defendants demurring to withdraw their said demurrers and answer the complaint within twenty days on payment of costs of the plaintiff, which have been duly adjusted at seventy-one $\frac{93}{100}$ dollars.

Now on motion of Horatio F. Averill, the attorney for plaintiff,

It is adjudged that the demurrers of said defendants, Henry Clews, John B. Alley, Abia A. Selover and Lee R. Shryock be, and the same

are hereby overruled, and that the plaintiff recover of the said defendants the sum of seventy-one and $\frac{83}{100}$ dollars costs, with leave to said defendants to withdraw said demurrers, and answer the complaint within twenty days upon payment of said costs, and that in case the said defendants shall fail to avail themselves of the leave hereby granted to withdraw their said demurrers and answer the complaint, final judgment be entered against said defendants for the relief to which the plaintiff, and other stockholders of the defendant corporation, and the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company are entitled; the same and the form of said final judgment to be determined and settled by the Hon. Charles Donohue, before whom this cause was tried, or by one of the other Justices of this Court.

C. DONOHUE, *J.*

Dated June 9th, 1883.

(Indorsed): Supreme Court. Eliphalet Nott, who sues as well, &c., against Henry Clews and others. Copy. Interlocutory Judgment. Horatio F. Averill, plaintiff's attorney, 120 Broadway, N. Y. City.

To ABBOTT BROTHERS, Esqs.,
Atty's for defts. CLEWS, ALLEY and SELOVER.

Rec'd June 9, '83.

SIRS:—Within is a copy of the interlocutory judgment overruling the demurrers in the within entitled action, which interlocutory judgment was this day duly entered and filed in the office of the Clerk of the City and County of New York, at the County Court House in said City.

Dated June 9th, 1883.

Yours, &c.,
H. F. AVERILL,
Plaintiff's Attorney.

To ABBOTT BROTHERS, Esqrs.,
Attorneys for defendants,
CLEWS, ALLEY & SELOVER.
R. H. SPENCER, Esq.,
Attorney for defendant, SHRYOCK.

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER and LEE R. SHRYOCK, impleaded, &c.

Please take notice that the above-named defendants appeal to the General Term of this Court, from so much of the interlocutory judgment entered herein on the 9th day of June, 1883, as overrules the demurrers of said defendants, with costs, and adjudges that unless said defendants withdraw said demurrers and pay said costs and answer the complaint within twenty days, final judgment be entered

against said defendants for the relief to which the plaintiff and other stockholders of the defendant corporation and the said defendant Las Neuve Minas de Santa Maria Gold and Silver Mining Company are entitled.

ABBOTT BROTHERS,
Attorneys for said Defendants,
CLEWS, ALLEY and SELOVER.

Dated June 13th, 1883.

R. H. SPENCER,
Attorney for defendant SHRYOCK.

To HORATIO F. AVERILL, Esq.,
Plaintiff's Attorney, and
PATRICK KEENAN, Esq.,
Clerk of said Court.

(Indorsed): New York Supreme Court. Eliphalet Nott, who sues, &c., against Henry Clews and al, impl., &c. Notice of Appeal. Abbott Brothers, Attorneys for defendants Clews, Alley and Selover, 71 Broadway, N. Y. R. H. Spencer, Attorney for defendant Shryock, 39 Broadway, N. Y.

Service of a copy of the within notice of appeal is hereby admitted, June 18, 1883.

(Sg) H. F. AVERILL,
Atty for Plaintiff.

Supreme Court—City and County of New York.

ELIPHALET NOTT, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER and LEE R. SHRYOCK, impleaded, &c.

Please take notice that upon the affidavits hereto annexed and upon the complaint, demurrer and all of the papers and proceedings in the above entitled action, we shall move the Court at a Special Term thereof, to be held at Chambers, in the County Court House, in the City of New York, on the first Monday of July, 1883, at eleven o'clock in the forenoon, for an order staying the plaintiff's proceedings in the above action, and staying the execution of the interlocutory judgment entered herein on the 9th day of June, 1883, until the hearing and determination of the appeal of said defendants therefrom, and for such other relief as may be just.

Dated June 23d, 1883.

ABBOTT BROS.,
Att'ys for Def'ts
CLEWS, ALLEY and SELOVER.

R. H. SPENCER,
Att'y for def't SHRYOCK.

To H. F. AVERILL, Esq.,
Attorney for Plaintiff.

Supreme Court—City and County of New York.

ELIPHALET NOTT, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER and LEE R. SHRYOCK, impleaded with others.

CITY AND COUNTY OF NEW YORK, *ss.:*

ALBERT A. ABBOTT being duly sworn says, that he is of counsel for the above named defendants in this action, which is brought for the benefit of the plaintiff and "for all other stockholders of the defend- "ant Las Nueve Minas de Santa Maria Gold and Silver Mining "Company who may choose to come in and avail themselves of the "benefits of this action and pay their proportion of the expenses "thereof." No other stockholders have come in or been made parties to this action: said defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges:

1. That plaintiff is a stockholder of said Mining Company.
2. That he purchased his stock in good faith and for value.
3. That said Mining Company is a corporation organized in October, 1881, under the laws of New York, with a capital stock of $25,000,000, divided into one million shares of $25 each.
4. That the above named defendants were trustees and directors of said Company for the first year.
5. That soon after the organization of said Company the individual defendants, acting for said Company, agreed with the owner of certain mining claims and property, to issue to him, or a trustee for him, or him and his associates, as full paid stock, all but seven shares of the whole capital stock of said Company, in consideration of the conveyance to said Company of said mining claims and property.
6. That said stock was issued and said property conveyed according to said agreement.
7. That said mining claims and property were of little or no value in their condition at that time—and were not worth $24,999,825, but had been purchased a short time before for $17,000—and that their actual value did not exceed $500,000, and that $24,999,825 was an unfair, excessive and improvident consideration therefor.
8. That immediately after the issue of such stock a large portion thereof "was turned over, by such vendor, to, and received by, the "individual defendants, and their associates, friends and nominees, at "a nominal price, which price was less than five per cent. of the par "value of said stock."
9. That this transfer was made in pursuance of a scheme or agreement between the vendor of said property and the individual defendants—and that after said stock had been so turned over it *was, or might have been* disposed of at a large profit.
10. That at the time of the issue and delivery of said stock, the individual defendants knew or could "with the exercise of due and "reasonable diligence have known" the condition, real value and cost of said property.

11. That the said defendants failed to make or record a certificate of the payment of the capital stock of said Company.

12. That said Company had no means—except $175—with which to work said property, and the individual defendants have made "ostensible efforts to work said mines," and that the Company is indebted therefor in the sum of over $90,000.

13. That the individual defendants, *by the certificates of stock*, represented to the public, including this plaintiff, that said stock was full paid, and that such stock, or a large proportion thereof, including the plaintiff's stock, has been sold as full-paid stock in the open market to innocent holders and purchasers, including plaintiff.

14. That plaintiff bought three hundred shares of said stock, the certificates for which were transferred to him, and new certificates thereafter issued to him upon the surrender of those which had been transferred to him.

15. That the individual defendants have received large sums of money, gains and profits from the sale of that portion of the stock turned over to them by the vendor of said property, and have not accounted to said Company therefor, nor for the difference between the amount of stock issued and the real value of the property for which it was issued.

16. That four of the individual defendants are still directors of said Company, and are a majority of its directors, *for which reason* said Company "is in no condition to bring and prosecute an action "for the relief sought by this action, and neglects to do so."

17. The plaintiff therefore prays that the said individual defendants may be adjudged trustees of the $25,000,000 represented by said million shares of stock, and that they be required to account for the same; *and further, that they may also be severally adjudged and decreed to account of and concerning the sums of money, gains and profits received by each from said sales of stock;* also, that the value of said mining property be determined; also, that the amount found due on such accounting be brought into Court, and disposed of as the Court may direct; also, that the plaintiff and such other stockholders as may come into this action, &c., may have their share of the outcome thereof.

It is not alleged in the complaint and it is not the fact that the plaintiff was a stockholder at the time when the supposed wrongs are therein alleged to have been committed; but, as deponent is informed and believes, the plaintiff purchased the three hundred shares of stock mentioned in the complaint between the 10th and 13th days of June, 1882, at a price not exceeding two dollars a share, which was then the general market price of said stock, and that as deponent is informed and believes, if the plaintiff has sustained any damage by reason of the matters alleged in the complaint, such damage does not exceed the sum of $600.

The only cause of action which is alleged in the complaint is that which the plaintiff claims to have as assignee of stock which he alleges was unlawfully issued.

There is no allegation in the complaint that the plaintiff, before commencing this action made any demand of the officers of the Company to redress his supposed injuries, or that he gave them any notice

of his intended action, or that they ever refused to bring such an action as this, or any action which their duty required them to bring.

Said demurrers came on for argument on the 3d day of June, 1883, at a Special Term of this Court held by Mr. Justice Donohue, and his decision was announced on the following day in the following words:

"DONOHUE, *J.*: It is sufficient to hold the complaint good, to find "any cause of action on the statements, whether they entitle the party "to the relief asked for or not. In this case I think there are such "facts as entitle plaintiff to some relief. The demurrer will be over-"ruled."

On the 9th day of June, 1883, an interlocutory decree was entered herein overruling said demurrer with costs, and giving said defendants leave to withdraw their demurrers and answer the complaint within twenty days on payment of costs, and adjudging that in default thereof final judgment be entered against said defendants for the relief to which the plaintiff and other stockholders of said Company are entitled.

On the 18th day of June, 1883, said defendants duly filed in the office of the Clerk of this Court, and served on plaintiff's attorney a notice of appeal from said interlocutory judgment to the General Term of this Court, and they are desirous of obtaining a stay of plaintiff's proceedings pending such appeal, and are able and willing to furnish such security as may be just, to indemnify the plaintiff for any damages which he has sustained or may sustain in the premises.

Deponent has carefully examined the complaint in this action, and the law applicable thereto, and is firmly convinced and believes that said decision of the Special Term of this Court is erroneous and should be reversed.

Said appeal is taken in good faith, and upon the advice of deponent.

Deponent has made careful examination into the merits of this case, and from his own knowledge and the statements of said defendants he believes that they have a good defence to said action upon the merits; but that from the nature of the case, if they were compelled to proceed to a trial upon the merits, the same would be protracted, expensive and burdensome.

(Sg.) ALBERT A. ABBOTT.

Sworn to before me this 23d day of June, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss.*:

ABIA A. SELOVER being duly sworn, says, that he is one of the defendants in the above action; that he has read the affidavit of A. A. Abbott hereto annexed, and that the same is true of his own knowledge in so far as it relates to the market price of the stock of the said

Mining Company, and as to the remainder of said affidavit he believes it to be true.

(Sg.) A. A. SELOVER.

Sworn to before me this 23d day of June, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court. Eliphalet Nott, &c., against Henry Clews and others, impleaded, &c. Copy—Affidavits and Notice of Motion for Stay pending appeal. Abbott Bros., Atty's for Defts. Clews, Alley and Selover, 71 Broadway. R. H. Spencer, Att'y for Deft. Shryock, 39 Broadway.

Supreme Court.

ELPHALET NOTT, who sues, etc.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER, and LEE R. SHYOCK, impleaded, &c.

On the annexed affidavit and on all the pleadings, papers and proceedings in the action.

It is hereby ordered, that the time within which the above-named defendants may withdraw their demurrer, pay costs and answer the complaint in this action, be and the same is hereby extended until ten days after the hearing and determination of the motion of said defendants for a stay of proceedings pending their appeal from the interlocutory decree entered herein, June 9, 1883.

Dated June 29, 1883. C. DONOHUE,
J.

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER, and LEE R. SHRYOCK, impleaded, &c.

CITY AND COUNTY OF NEW YORK, *ss.:*

ALBERT A. ABBOTT, being duly sworn says, that he is the attorney for the three defendants first above named and counsel for said Shryock.

That the above named defendants demurred to the complaint herein on the ground that it did not state facts sufficient to constitute a cause of action. That said demurrer was overruled by the Special Term of this Court, and an interlocutory judgment entered herein on the 9th day of June, 1883, overruling said demurrer and adjudging that the plaintiff recover costs, with leave to said defendants to withdraw said demurrer and answer the complaint within twenty days upon payment of said costs. Said time to answer expires this day. In the meantime

said defendants have appealed from said interlocutory judgment, and have served due notice of a motion to be made on the 2d day of July, 1883, for a stay of proceedings pending such appeal, upon security the amount of which remains to be fixed; but said defendants desire to provide against the possible contingency of the denial of said motion or the requirement of such an amount by way of security as would embarass them to obtain, and to preserve their right to withdraw their demurrer and appeal and answer to the merits.

Deponent further says, that from a statement of the facts of this case made to him by each of said defendants, he verily believes that each of said defendants has a good and substantial defence to this action upon the merits.

Deponent further says, that no other application for this order has been made, and no extension of said defendants' time to withdraw said demurrer and answer has been granted.

A. A. ABBOTT.

Sworn to before me this 29th day of June, 1883.

JOHN W. FISKE,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court. Eliphalet Nott, &c., against Henry Clews, & al. Affidavit and order extending time, &c. Abbott Brothers, attorneys for defendants, 71 Broadway, New York.

Service of the within is hereby admitted June 29, 1883.

H. F. AVERILL,
Plaintiff's Attorney.

Supreme Court.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS and others. } 164

Defendants' motion for a stay pending appeal herein is adjourned by consent to July 12th, 1883, without prejudice to rights of defendants to withdraw demurrers, &c., and answer within ten days after hearing and determination of said motion.

Dated June 30th, 1883.

H. F. AVERILL,
Plaintiff's Attorney.

ABBOTT BROTHERS,
Attorneys for Defendants,
CLEWS, ALLEY and SELOVER.

R. H. SPENCER,
Attorney for defendant SHRYOCK.

(Indorsed): Supreme Court. Eliphalet Nott, who sues, &c., against Henry Clews and others. Adjournment of motion for stay.

Supreme Court—City and County of New York.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER and LEE R. SHRYOCK, impleaded, &c.

Please take notice, that the above-named defendants hereby withdraw their appeal and notice of appeal from so much of the interlocutory judgment, entered herein on the 9th day of June, 1883, as overrules the demurrers of said defendants with costs and adjudges that unless said defendants withdraw said demurrers and pay said costs, and answer the complaint within twenty days, final judgment be entered against said defendants for the relief to which the plaintiff and other stockholders of the defendant corporation, and the said defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company are entitled.

Dated August 1st, 1883.

ABBOTT BROTHERS,
Attorneys for said defendants
CLEWS, ALLEY and SELOVER.

R. H. SPENCER,
Attorney for defendant SHRYOCK.

To HORATIO F. AVERILL, Esq.,
Plaintiff's Attorney, and
PATRICK KEENAN, Esq.,
Clerk of said Court.

(Indorsed): Supreme Court. Eliphalet Nott, &c., against Henry Clews & al, impleaded, &c. Notice of withdrawal of appeal. Abbott Brothers, attorneys for defendants Clews, Alley and Selover, 71 Broadway, N. Y. R. H. Spencer, attorney for defendant Shryock, 39 Broadway, N. Y.

Service of a copy of the within notice is hereby admitted this 1st day of August, 1883.

H. F. AVERILL,
Plaintiff's Attorney.

New York Supreme Court.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, LEE R. SHRYOCK and ABIA A. SELOVER, impleaded with others.

Please take notice, that the above-named defendants hereby withdraw their respective demurrers to the complaint of the plaintiff in the above entitled action.

Dated August 1st, 1883.

ABBOTT BROTHERS,
Attorneys for Defendants,
CLEWS, ALLEY and SELOVER.

R. H. SPENCER,
Attorney for Defendant SHRYOCK.

To HORATIO F. AVERILL, Esq.,
Attorney for Plaintiff.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott, &c., against Henry Clews and others, impleaded, &c. Notice of withdrawal of demurers. Abbott Brothers, Attorney for Defendants, Clews, Alley and Selover, 71 Broadway, N. Y. R. H. Spencer, Attorney for Defendant Shryock, 39 Broadway.

Service of a copy of the within notice is hereby admitted this 1st day of August, 1883.

H. F. AVERILL,
Plaintiff's Attorney.

Supreme Court.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS, JOHN B. ALLEY, ABIA A. SELOVER and LEE R. SHRYOCK, impleaded with others.

Received from the above-named defendants by the hand of Albert A. Abbott, ninety-two dollars and fifty-three cents, in full for the costs awarded to the plaintiff by the interlocutory decree entered herein on the 9th day of June, 1883, with interest thereon to date, and also in full for the costs which have accrued to date upon the appeal of said defendants from said interlocutory decree.

HORATIO F. AVERILL,
Dated August 1st, 1883. *Plaintiff's Attorney.*

(Indorsed): Supreme Court. Eliphalet Nott, who sues, &c., against Henry Clews, impleaded with others. Receipt for Costs. Abbott Bros., atty's for defts. Clews, Alley and Selover, 71 Broadway. R. H. Spencer, att'y for def't Shryock, 39 Broadway, N. Y.

Supreme Court.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,
Plaintiff,
against
HENRY CLEWS, impleaded with others,
Defendant.

The defendant Henry Clews, by Abbott Brothers, his attorneys, separately answering the complaint of the plaintiff in the above-entitled action:

I. Admits and alleges that the plaintiff is a stockholder of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, to the extent of three hundred shares of the stock of said Company and no more, of the par value of $25 for each share, and that, as this defendant is informed and believes, the plaintiff became

the owner and holder of said stock at some time between the 9th and 14th days of June, 1882.

II. This defendant has no knowledge and no information sufficient to form a belief, as to whether the plaintiff purchased his stock in good faith or for a valuable consideration, but alleges that the price at which said stock was being generally sold at the time when plaintiff acquired his said stock, did not exceed two dollars per share.

III. This defendant for himself admits the allegations contained in paragraph numbered "First" of the complaint.

This defendant denies that he ever became or was in law or in fact a trustee or director of the defendant Company, and denies that he ever acted as such trustee and denies that he was ever the owner or holder of any of the stock of said defendant Company.

He admits that the individual defendants were named in the Certificate of Incorporation of the defendant Company as its trustees for the first year.

This defendant alleges that the following-named defendants resigned their position as trustees, respectively, as follows: said A. B. Meeker, February 4, 1882; said H. H. Honore, August 23, 1882; said Frederick D. Grant, June 6, 1882.

IV. This defendant admits and alleges that, on the 8th day of October, 1881, at a meeting of the Board of Trustees of the defendant Company it was resolved by said Board of Trustees, acting on behalf of said Company, and agreed by and between them and the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to said owner, or to his order, as full-paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said corporation, amounting to $24,999,825 (being all of the capital stock of said Company except seven shares), for the consideration of the conveyance of of said mining claims and property to the defendant corporation, and that said mining claims and property were conveyed in due form and said stock issued accordingly.

V. This defendant denies that he has any knowledge or information sufficient to form a belief of the truth of any of the allegations contained in the paragraph or subdivision of the complaint numbered "Fourth."

This defendant further alleges that on the said 8th day of October, 1881, after due and reasonable inquiry and examination had been made by the trustees of the defendant Company respecting the character and value of said mining claims and property, and for a long time thereafter this defendant believed, and, as he is informed and believes, the other individual defendants, and the trustees of the defendant Company believed, that the fair and reasonable value of said mining claims and property to said defendant Company, and for the uses and purposes of the defendant Company, equalled or exceeded the sum of $24,999,825, and that the same was necessary for the business and purposes of said Company, and that the stock of said Company to that amount was issued in payment therefor in good faith.

VI. This defendant denies each and every allegation contained in the paragraphs of the complaint numbered "Fifth" and "Sixth," in so far as the same relate to or affect him, and in so far as they relate to

or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VII. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Seventh," in so far as the same relate to or affect him, and in so far as the same state to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VIII. This defendant admits that the allegations contained in paragraph numbered "Eighth" of the complaint are true.

IX. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Ninth," excepting that he admits and alleges that after the issue and disposition of said stock as hereinbefore set forth, the defendant Company through its officers and trustees made diligent and continued efforts to work and develop said mining claims and property in the interest and for the benefit of said corporation and its stockholders, and the result of such efforts has been to greatly improve and increase the value of said mining claims and property. That in so improving and developing said property an indebtedness on the part of said defendant corporation has been incurred of ninety thousand dollars and upwards.

X. This defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint numbered "Tenth," excepting that he admits that the proper officers of the defendant Company, acting by and under the authority of the Board of Trustees of the defendant Company—in issuing certificates of the stock of said Company—have issued the same in the following form, viz.:

Shares. Full paid and unassessable. Shares.

Incorporated under the laws of the State of New York.

Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

No.

1,000,000 shares. Countersigned and Registered. this day of 188

This certifies that.....

.....entitled to.....shares of the capital stock of the Las Nueve Minas de Santa Maria Gold and Silver Mining Company, transferable only on the books of the company in person, or by attorney on surrender of this certificate.

New York, 188

....

Secretary. President.

1,000,000 shares.

Location of Mines, State of Sonora, Republic of Mexico.

Capital $25,000,000. Shares $25 each.

XI. This defendant denies that the plaintiff purchased his said stock relying upon any belief in the representations alleged in the complaint, but admits that, as he is informed and believes, the plaintiff received from a prior holder certificates issued as aforesaid for three hundred shares of the stock of said Company, accompanied by the usual power or powers of attorney for the transfer of the same, and that plaintiff surrendered the same, and obtained new certificates

therefor as alleged in paragraph numbered "Eleventh" of the complaint.

XII. This defendant denies each and every allegation of the complaint contained in paragraph numbered "Twelfth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

XIII. This defendant admits that he has not, and that, as he is informed and believes, the other individual defendants have not, paid anything to the defendant corporation or accounted to said corporation for any of the matters alleged and referred to in paragraph numbered "Thirteenth" of the complaint, and this defendant denies that he, or any, or either of the individual defendants is indebted to said corporation or liable to account for or to pay anything whatever to said corporation for or by reason of any or either of said alleged matters, and this defendant denies that he has received any gains or profits such as are alleged and referred to in said paragraph "Thirteenth" of the complaint herein.

XIV. This defendant for himself denies that he is still one of the directors or trustees of the defendant corporation, and he has no knowledge and no information sufficient to form a belief as to whether three or any of the other individual defendants are still trustees or directors of said Company.

This defendant denies that the individual defendants, or any of them, control said corporation, and denies that by reason of any of the matters alleged in the complaint the said defendant company is in no condition to bring and prosecute an action for the relief sought by this action, and this defendant denies that said defendant corporation, or its officers or trustees, have ever neglected or refused to bring or prosecute any action which it was their duty to bring or prosecute.

And this defendant alleges that no demand or request was ever made of said officers or trustees, or either of them, to commence or prosecute this or any other action, or to redress the supposed grievances set forth in the complaint, or any or either of them.

XV. This defendant further alleges that said plaintiff, since he became such stockholder, has directly ratified and approved of every act and thing done by said individual defendants, or either of them, as trustees of the defendant company, and is thereby estopped from maintaining this action.

XVI. This defendant denies each and every allegation contained in said complaint, excepting such as are hereinbefore specifically admitted or specifically controverted.

Wherefore this defendant demands judgment that the complaint be dismissed with costs.

ABBOTT BROTHERS,
Atty's. for Deft. HENRY CLEWS.

Office and P. O. address, 71 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.:*

HENRY CLEWS, being duly sworn, says, that he is one of the defendants in the above entitled action, and that he has read the foregoing answer and knows the contents thereof, and that the same is true to

his own knowledge, excepting as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

HENRY CLEWS.

Sworn to before me this 1st day of August, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of New York. Eliphalet Nott, who sues, &c., against Henry Clews, impleaded with others. Copy. Answer of the defendant, Henry Clews. Abbott Brothers, attorneys for defendant, Henry Clews, 71 Broadway, N. Y. City.

Service of a copy of within answer is admitted this 1st day of August, 1883. H. F. AVERILL,
Plff's. Att'y.

Supreme Court.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,
Plaintiff,

against

JOHN B. ALLEY, impleaded with others,
Defendant.

The defendant, John B. Alley, by Abbott Brothers, his attorneys, separately answering the complaint of the plaintiff in the above entitled action:

I. Admits and alleges that the plaintiff is a stockholder of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, to the extent of three hundred shares of the stock of said Company, and no more, of the par value of $25 for each share, and that, as this defendant is informed, and believes, the plaintiff became the owner and holder of said stock at some time between the 9th and 14th days of June, 1882.

II. This defendant has no knowledge and no information sufficient to form a belief, as to whether the plaintiff purchased his stock in good faith or for a valuable consideration, but alleges that the price at which said stock was being generally sold at the time when plaintiff acquired his said stock, did not exceed two dollars per share.

III. This defendant for himself admits the allegations contained in paragraph numbered "First" of the complaint, and in so far as they relate to himself he admits the allegations contained in paragraph numbered "Second" of the complaint. He admits that the individual defendants were named in the Certificate of Incorporation of the defendant Company as its trustees for the first year. This defendant alleges that the following named defendants resigned their position as trustees, respectively, as follows: said A. B. Meeker, February 4,

1882; said H. H. Honore, August 23, 1882; said Frederick D. Grant, June 6, 1882.

IV. This defendant admits and alleges that, on the 8th day of October, 1881, at a meeting of the Board of Trustees of the defendant Company, it was resolved by said Board of Trustees, acting on behalf of said Company, and agreed by and between them and the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to said owner, or to his order, as full-paid stock, nine hundred and ninety-nine thousand nine hundred and ninety-three shares of the capital stock of said corporation, amounting to $24,999,825 (being all of the capital stock of said Company except seven shares), for the consideration of the conveyance of said mining claims and property to the defendant corporation, and that said mining claims and property were conveyed in due form and said stock issued accordingly.

V. This defendant denies that he has any knowledge or information sufficient to form a belief of the truth of any of the allegations contained in the paragraph or sub-division of the complaint numbered "Fourth."

This defendant further alleges that on the said 8th day of October, 1881, after due and reasonable inquiry and examination had been made by the trustees of the defendant Company respecting the character and value of said mining claims and property, and for a long time thereafter, this defendant believed, and, as he is informed and believes, the other individual defendants, and the trustees of the defendant Company believed, that the fair and reasonable value of said mining claims and property to said defendant Company, and for the uses and purposes of the defendant Company, equalled or exceeded the sum of $24,999,825, and that the same was necessary for the business and purposes of said Company, and that the stock of said Company to that amount was issued in payment therefor in good faith.

VI. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Fifth" and "Sixth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VII. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Seventh," in so far as the same relate to or affect him, and in so far as the same relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VIII. This defendant admits that the allegations contained in paragraph numbered "Eighth" of the complaint are true.

IX. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Ninth," excepting that he admits and alleges that after the issue and disposition of said stock as hereinbefore set forth, the defendant Company through its officers and trustees made diligent and continued efforts to work and develop said mining claims and property in the interest and for the benefit of said corporation and its stockholders, and the result of such efforts

has been to greatly improve and increase the value of said mining claims and property. That in so improving and developing said property an indebtedness on the part of said defendant corporation has been incurred of ninety thousand dollars and upwards.

X. This defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint numbered "Tenth," excepting that he admits that the proper officers of the defendant Company, acting by and under the authority of the Board of Trustees of the defendant Company, in issuing certificates of the stock of said Company, have issued the same in the following form, viz. :

Shares. Full Paid and Unaccessable Shares.

Incorporated under the Laws of the State of New York.

Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

No.

1,000,000 Shares Countersigned and Registered this day of 188–

This certifies that.....

.....entitled to.....shares of the Capital Stock of the Las Nueve Minas de Santa Maria Gold and Silver Mining Company, transferable only on the books of the Company in person, or by attorney on surrender of this Certificate.

New York..... .188..

....

Secretary. President.

1,000,000 Shares.

Location of Mines, State of Sonora, Republic of Mexico.

Capital, $25,000,000. Shares, $25 each.

XI. This defendant denies that the plaintiff purchased his said stock relying upon any belief in the representations alleged in the complaint, but admits that, as he is informed and believes, the plaintiff received from a prior holder certificates issued as aforesaid for three hundred shares of the stock of said Company, accompanied by the usual power or powers of attorney for the transfer of the same, and that plaintiff surrendered the same, and obtained new certificates therefor, as alleged in paragraph numbered "Eleventh" of the complaint.

XII. This defendant denies each and every allegation of the complaint contained in paragraph numbered "Twelfth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

XIII. This defendant admits that he has not, and that, as he is informed and believes, the other individual defendants have not, paid anything to the defendant corporation or accounted to said corporation for any of the matters alleged and referred to in paragraph numbered "Thirteenth" of the complaint; and this defendant denies that he, or any, or either of the individual defendants, is indebted to said corporation or liable to account for or to pay anything whatever to said corporation for or by reason of any or either of said alleged matters; and this defendant denies that he has received any gains or profits, such as are alleged and referred to in said paragraph "Thirteenth" of the complaint herein.

XIV. This defendant, for himself, admits that he is still one of the directors or trustees of the defendant corporation, but he has no knowledge and no information sufficient to form a belief as to whether three or any of the other individual defendants are still trustees or directors of said Company.

This defendant denies that the individual defendants, or any of them, control said corporation, and denies that by reason of any of the matters alleged in the complaint the said defendant Company is in no condition to bring and prosecute an action for the relief sought by this action; and this defendant denies that said defendant corporation, or its officers or trustees, have ever neglected or refused to bring or prosecute any action which it was their duty to bring or prosecute.

And this defendant alleges that no demand or request was ever made of said officers or trustees, or either of them, to commence or prosecute this or any other action, or to redress the supposed grievances set forth in the complaint, or any or either of them.

XV. This defendant further alleges that said plaintiff, since he became such stockholder, has directly ratified and approved of every act and thing done by said individual defendants, or either of them, as trustees of the defendant Company, and is thereby estopped from maintaining this action.

XVI. This defendant denies each and every allegation contained in said complaint, excepting such as are hereinbefore specifically admitted, or specifically controverted.

Wherefore this defendant demands judgment that the complaint be dismissed, with costs.

ABBOTT BROTHERS,
Atty's for def't ALLEY.

Office and P. O. Address, 71 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.*

JOHN B. ALLEY, being duly sworn, says, that he is one of the defendants in the above entitled action, and that he has read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, excepting as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

JOHN B. ALLEY.

Sworn to before me, this 1st day of August, 1883.
JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of New York. Eliphlet Nott, who sues, &c., against John B. Alley, impleaded with others. Copy. Answer of the defendant, John B. Alley. Attorneys for defendant, Broadway, N. Y. City.

Service of a copy of the within answer is admitted this 1st day of August, 1883.
H. F. AVERILL,
Plaintiff's Att'y.

Supreme Court.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof.

Plaintiff,

against

ABIA A. SELOVER, impleaded with others,

Defendant.

The defendant, Abia A. Selover, by Abbott Brothers, his attorneys, separately answering the complaint of the plaintiff in the above-entitled action:

I. Admits and alleges that the plaintiff is a stockholder of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, to the extent of three hundred shares of the stock of said Company and no more, of the par value of $25 for each share, and that, as this defendant is informed and believes, the plaintiff became the owner and holder of said stock at some time between the 9th and 14th days of June, 1882.

II. This defendant has no knowledge and no information sufficient to form a belief, as to whether the plaintiff purchased his stock in good faith or for a valuable consideration, but alleges that the price at which said stock was being generally sold at the time when plaintiff acquired his said stock did not exceed two dollars per share.

III. This defendant for himself admits the allegations contained in paragraph numbered "First" of the complaint, and in so far as they relate to himself he admits the allegations contained in paragraph numbered "Second" of the complaint.

He admits that the individual defendants were named in the Certificate of Incorporation of the defendant Company as its trustees for the first year.

This defendant alleges that the following-named defendants resigned their position as trustees, respectively, as follows: said A. B. Meeker, February 4, 1882; said H. H. Honore, August 23, 1882; said Frederick D. Grant, June 6, 1882.

IV. This defendant admits and alleges that, on the 8th day of October, 1881, at a meeting of the Board of Trustees of the defendant Company it was resolved by said Board of Trustees, acting on behalf of said Company, and agreed by and between them and the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to said owner, or to his order, as full-paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said corporation, amounting to $24,999,825, (being all of the capital stock of said Company except seven shares), for the consideration of the conveyance of said mining claims and property to the defendant corporation, and that said mining claims and property were conveyed in due form and said stock issued accordingly.

V. This defendant denies that he has any knowledge or information sufficient to form a belief of the truth of any of the allegations contained in the paragraph or subdivision of the complaint numbered "Fourth."

This defendant further alleges that on the said 8th day of October, 1881, after due and reasonable inquiry and examination had been made by the trustees of the defendant Company respecting the character and value of said mining claims and property, and for a long time thereafter, this defendant believed, and, as he is informed and believes, the other individual defendants, and the trustees of the defendant Company believed, that the fair and reasonable value of said mining claims and property to said defendant Company, and for the uses and purposes of the defendant Company, equalled or exceeded the sum of $24,999,825, and that the same was necessary for the business and purposes of said Company, and that the stock of said Company to that amount was issued in payment therefor in good faith.

VI. This defendant denies each and every allegation contained in the paragraphs of the complaint numbered "Fifth" and "Sixth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VII. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Seventh," in so far as the same relate to or affect him, and in so far as the same relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VIII. This defendant admits that the allegations contained in paragraph numbered "Eighth" of the complaint are true.

IX. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Ninth," excepting that he admits and alleges that after the issue and disposition of said stock as hereinbefore set forth, the defendant Company through its officers and trustees made diligent and continued efforts to work and develop said mining claims and property in the interest and for the benefit of said corporation and its stockholders, and the result of such efforts has been to greatly improve and increase the value of said mining claims and property. That in so improving and developing said property an indebtedness on the part of said defendant corporation has been incurred, of ninety thousand dollars and upwards.

X. This defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint numbered "Tenth," excepting that he admits that the proper officers of the defendant Company, acting by and under the authority of the Board of Trustees of the defendant Company, in issuing certificates of the stock of said Company, have issued the same in the following form, viz.:

Shares. Shares.

Full paid and Unassessable.

Incorporated under the Laws of the State of New York.

Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

No.....

1,000,000 shares. Countersigned and registered this day of 188

This Certifies that .....

.....entitled to..... .....Shares of the Capital Stock of the Las Nueve Minas de Santa Maria Gold and Silver Mining Company, transferable only on the books of the Company in person, or by attorney on surrender of this certificate.

New York,..... .....188..

.....Secretary. .....President

1,000,000 shares.

Location of Mines, State of Sonora, Republic of Mexico.

Capital $25,000,000. Shares, $25 each.

XI. This defendant denies that the plaintiff purchased his said stock relying upon any belief in the representations alleged in the complaint, but admits that, as he is informed and believes, the plaintiff received from a prior holder certificates issued as aforesaid, for three hundred shares of the stock of said Company, accompanied by the usual power or powers of attorney for the transfer of the same, and that plaintiff surrendered the same, and obtained new certificates therefor as alleged in paragraph numbered "Eleventh" of the complaint.

XII. This defendant denies each and every allegation of the complaint contained in paragraph numbered "Twelfth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

XIII. This defendant admits that he has not, and that, as he is informed and believes, the other individual defendants have not, paid anything to the defendant corporation or accounted to said corporation for any of the matters alleged and referred to in paragraph numbered "Thirteenth" of the complaint, and this defendant denies that he, or any, or either of the individual defendants is indebted to said corporation or liable to account for or to pay anything whatever to said corporation for or by reason of any or either of said alleged matters, and this defendant denies that he has received any gains or profits such as are alleged and referred to in said paragraph "Thirteenth" of the complaint herein.

XIV. This defendant for himself admits that he is still one of the directors or trustees of the defendant corporation, but he has no knowledge and no information sufficient to form a belief as to whether three or any of the other individual defendants are still trustees or directors of said Company.

This defendant denies that the individual defendants, or any of them, control said corporation, and denies that by reason of any of the matters alleged in the complaint the said defendant Company is

in no condition to bring and prosecute an action for the relief sought by this action, and this defendant denies that said defendant corporation or its officers or trustees, have ever neglected or refused to bring or prosecute any action which it was their duty to bring or prosecute.

And this defendant alleges that no demand or request was ever made of said officers or trustees, or either of them, to commence or prosecute this or any other action, or to redress the supposed grievances set forth in the complaint, or any or either of them.

XV. This defendant further alleges that said plaintiff since he became such stockholder has directly ratified and approved of every act and thing done by said individual defendants, or either of them, as trustees of the defendant Company, and is thereby estopped from maintaining this action.

XVI. This defendant denies each and every allegation contained in said complaint, excepting such as are hereinbefore specifically admitted or specifically controverted.

Wherefore this defendant demands judgment that the complaint be dismissed with costs.

ABBOTT BROS.,
Att'ys for def't SELOVER.

Office and P. O. Address, 71 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.:*

ABIA A. SELOVER, being duly sworn, says, that he is one of the defendants in the above entitled action and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, excepting as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

A. A. SELOVER.

Sworn to before me, this 1st day of August, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of New York. Eliphalet Nott, who sues, &c., against Abia A. Selover, impleaded with others. Copy. Answer of the defendant Abia A. Selover. Abbott Bros., attorneys for defendant Selover, 71 Broadway, N. Y. City.

Service of a copy of the within answer is admitted this 1st day of August, 1883.

H. F. AVERILL.
Plaintiff's Att'y.

Supreme Court.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,

Plaintiff,

against

LEE R. SHRYOCK, impleaded with others,

Defendant.

The defendant Lee R. Shryock, by R. H. Spencer, his attorney, separately answering the complaint of the plaintiff in the above-entitled action:

I. Admits and alleges that the plaintiff is a stockholder of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, to the extent of three hundred shares of the stock of said Company and no more, of the par value of $25 for each share, and that, as this defendant is informed and believes, the plaintiff became the owner and holder of said stock at some time between the 9th and 14th days of June, 1882.

II. This defendant has no knowledge and no information sufficient to form a belief, as to whether the plaintiff purchased his stock in good faith or for a valuable consideration, but alleges that the price at which said stock was being generally sold at the time when plaintiff acquired his said stock did not exceed two dollars per share.

III. This defendant for himself admits the allegations contained in paragraph numbered "First" of the complaint, and in so far as they relate to himself he admits the allegations contained in paragraph numbered "Second" of the complaint.

He admits that the individual defendants were named in the Certificate of Incorporation of the defendant Company as its trustees for the first year.

This defendant alleges that the following-named defendants resigned their position as trustees, respectively, as follows: said A. B. Meeker, February 4, 1882; said H. H. Honore, August 23, 1882; said Frederick D. Grant, June 6, 1882.

IV. This defendant admits and alleges that, on the 8th day of October, 1881, at a meeting of the Board of Trustees of the defendant Company it was resolved by said Board of Trustees, acting on behalf of said Company, and agreed by and between them and the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to said owner, or to his order, as full-paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said corporation, amounting to $24,999,825, (being all of the capital stock of said Company except seven shares), for the consideration of the conveyance of said mining claims and property to the defendant corporation, and that said mining claims and property were conveyed in due form and said stock issued accordingly.

in no condition to bring and prosecute an action for the relief sought by this action, and this defendant denies that said defendant corporation or its officers or trustees, have ever neglected or refused to bring or prosecute any action which it was their duty to bring or prosecute.

And this defendant alleges that no demand or request was ever made of said officers or trustees, or either of them, to commence or prosecute this or any other action, or to redress the supposed grievances set forth in the complaint, or any or either of them.

XV. This defendant further alleges that said plaintiff since he became such stockholder has directly ratified and approved of every act and thing done by said individual defendants, or either of them, as trustees of the defendant Company, and is thereby estopped from maintaining this action.

XVI. This defendant denies each and every allegation contained in said complaint, excepting such as are hereinbefore specifically admitted or specifically controverted.

Wherefore this defendant demands judgment that the complaint be dismissed with costs.

ABBOTT BROS.,
Att'ys for def't SELOVER.

Office and P. O. Address, 71 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.:*

ABIA A. SELOVER, being duly sworn, says, that he is one of the defendants in the above entitled action and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, excepting as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

A. A. SELOVER.

Sworn to before me, this 1st day of August, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of New York. Eliphalet Nott, who sues, &c., against Abia A. Selover, impleaded with others. Copy. Answer of the defendant Abia A. Selover. Abbott Bros., attorneys for defendant Selover, 71 Broadway, N. Y. City.

Service of a copy of the within answer is admitted this 1st day of August, 1883.

H. F. AVERILL,
Plaintiff's Att'y.

Supreme Court.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,

Plaintiff,

against

LEE R. SHRYOCK, impleaded with others,

Defendant.

The defendant Lee R. Shryock, by R. H. Spencer, his attorney, separately answering the complaint of the plaintiff in the above-entitled action:

I. Admits and alleges that the plaintiff is a stockholder of the defendant Las Nueve Minas de Santa Maria Gold and Silver Mining Company, to the extent of three hundred shares of the stock of said Company and no more, of the par value of $25 for each share, and that, as this defendant is informed and believes, the plaintiff became the owner and holder of said stock at some time between the 9th and 14th days of June, 1882.

II. This defendant has no knowledge and no information sufficient to form a belief, as to whether the plaintiff purchased his stock in good faith or for a valuable consideration, but alleges that the price at which said stock was being generally sold at the time when plaintiff acquired his said stock did not exceed two dollars per share.

III. This defendant for himself admits the allegations contained in paragraph numbered "First" of the complaint, and in so far as they relate to himself he admits the allegations contained in paragraph numbered "Second" of the complaint.

He admits that the individual defendants were named in the Certificate of Incorporation of the defendant Company as its trustees for the first year.

This defendant alleges that the following-named defendants resigned their position as trustees, respectively, as follows: said A. B. Meeker, February 4, 1882; said H. H. Honore, August 23, 1882; said Frederick D. Grant, June 6, 1882.

IV. This defendant admits and alleges that, on the 8th day of October, 1881, at a meeting of the Board of Trustees of the defendant Company it was resolved by said Board of Trustees, acting on behalf of said Company, and agreed by and between them and the owner of certain mining claims and property situated in the State of Sonora, in the Republic of Mexico, to issue to said owner, or to his order, as full-paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said corporation, amounting to $24,999,825, (being all of the capital stock of said Company except seven shares), for the consideration of the conveyance of said mining claims and property to the defendant corporation, and that said mining claims and property were conveyed in due form and said stock issued accordingly.

V. This defendant denies that he has any knowledge or information sufficient to form a belief of the truth of any of the allegations contained in the paragraph or subdivision of the complaint numbered "Fourth."

This defendant further alleges that on the said 8th day of October, 1881, after due and reasonable inquiry and examination had been made by the trustees of the defendant Company respecting the character and value of said mining claims and property, and for a long time thereafter, this defendant believed, and, as he is informed and believes, the other individual defendants, and the trustees of the defendant Company believed, that the fair and reasonable value of said mining claims and property to said defendant Company, and for the uses and purposes of the defendant Company, equalled or exceeded the sum of $24,999,825, and that the same was necessary for the business and purposes of said Company, and that the stock of said Company to that amount was issued in payment therefor in good faith.

VI. This defendant denies each and every allegation contained in the paragraphs of the complaint numbered "Fifth" and "Sixth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VII. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Seventh," in so far as the same relate to or affect him, and in so far as the same relate to or affect the other individual defendants, or any of them, he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

VIII. This defendant admits that the allegations contained in paragraph numbered "Eighth" of the complaint are true.

IX. This defendant denies each and every allegation contained in the paragraph of the complaint numbered "Ninth," excepting that he admits and alleges that after the issue and disposition of said stock as hereinbefore set forth, the defendant Company through its officers and trustees made diligent and continued efforts to work and develop said mining claims and property in the interest and for the benefit of said corporation and its stockholders, and the result of such efforts has been to greatly improve and increase the value of said mining claims and property. That in so improving and developing said property an indebtedness on the part of said defendant corporation has been incurred, of ninety thousand dollars and upwards.

X. This defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint numbered "Tenth," excepting that he admits that the proper officers of the defendant Company, acting by and under the authority of the Board of Trustees of the defendant Company, in issuing certificates of the stock of said Company, have issued the same in the following form, viz.:

Shares. Shares.

Full paid and Unassessable.

Incorporated under the Laws of the State of New York.

Las Nueve Minas de Santa Maria Gold and Silver Mining Company.

1,000,000 shares. Countersigned and registered this day of 188

No.....

This Certifies that ....

.....entitled to..... .....Shares of the Capital Stock of the Las Nueve Minas de Santa Maria Gold and Silver Mining Company, transferable only on the books of the Company in person, or by attorney on surrender of this certificate.

New York,.....188..

.....Secretary. .....President

1,000,000 shares.

Location of Mines, State of Sonora, Republic of Mexico.

Capital $25,000,000. Shares, $25 each.

XI. This defendant denies that the plaintiff purchased his said stock relying upon any belief in the representations alleged in the complaint, but admits that, as he is informed and believes, the plaintiff received from a prior holder certificates issued as aforesaid, for three hundred shares of the stock of said Company, accompanied by the usual power or powers of attorney for the transfer of the same, and that plaintiff surrendered the same, and obtained new certificates therefor as alleged in paragraph numbered "Eleventh" of the complaint.

XII. This defendant denies each and every allegation of the complaint contained in paragraph numbered "Twelfth," in so far as the same relate to or affect him, and in so far as they relate to or affect the other individual defendants he denies that he has any knowledge or information sufficient to form a belief of the truth thereof.

XIII. This defendant admits that he has not, and that, as he is informed and believes, the other individual defendants have not, paid anything to the defendant corporation or accounted to said corporation for any of the matters alleged and referred to in paragraph numbered "Thirteenth" of the complaint, and this defendant denies that he, or any, or either of the individual defendants is indebted to said corporation or liable to account for or to pay anything whatever to said corporation for or by reason of any or either of said alleged matters, and this defendant denies that he has received any gains or profits such as are alleged and referred to in said paragraph "Thirteenth" of the complaint herein.

XIV. This defendant for himself admits that he is still one of the directors or trustees of the defendant corporation.

This defendant denies that the individual defendants, or any of them, control said corporation, and denies that by reason of any of the matters alleged in the complaint the said defendant Company is

in no condition to bring and prosecute an action for the relief sought by this action, and this defendant denies that said defendant corporation or its officers or trustees, have ever neglected or refused to bring or prosecute any action which it was their duty to bring or prosecute.

And this defendant alleges that no demand or request was ever made of said officers or trustees, or either of them, to commence or prosecute this or any other action, or to redress the supposed grievances set forth in the complaint, or any or either of them.

XV. This defendant further alleges that said plaintiff since he became such stockholder has directly ratified and approved of every act and thing done by said individual defendants, or either of them, as trustees of the defendant Company, and is thereby estopped from maintaining this action.

XVI. This defendant denies each and every allegation contained in said complaint, excepting such as are hereinbefore specifically admitted or specifically controverted.

Wherefore this defendant demands judgment that the complaint be dismissed with costs.

RICHARD H. SPENCER,
Att'y for def't LEE R. SHRYOCK.

Office and P. O. Address, 39 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.:*

LEE R. SHRYOCK, being duly sworn, says, that he is one of the defendants in the above entitled action and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, excepting as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

LEE R. SHRYOCK.

Sworn to before me, this 1st day of August, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of New York. Eliphalet Nott, who sues, &c., against Lee R. Shryock, impleaded with others. Copy. Answer of the defendant Lee R. Shryock. R. H. Spencer, Attorney for defendant Shryock, 39 Broadway, N. Y. City.

Service of a copy of the within answer is hereby admitted this 1st day of August, 1883.

H. F. AVERILL,
Plaintiff's Att'y.

Supreme Court of the State of New York—City and County of New York.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,

Plaintiff,

against

FREDERICK D. GRANT, impleaded with HENRY CLEWS and others,

Defendants.

The defendant, Frederick D. Grant, by Davies, Work, McNamee & Hilton, his attorneys, hereby demurs to the complaint of the plaintiff herein, and states as the grounds of his demurrer, the following objections:

FIRST. That the plaintiff has not legal capacity to sue and cannot maintain this action either on his own behalf alone, or for himself, and also for all other stockholders who shall come in and be made parties to this action, and contribute to the expenses thereof; also for the reason that this action could not be maintained by one or more stockholders of the said Las Neuve Minas de Santa Maria Gold and Silver Mining Company; also for the reason that this action could not be maintained by the said Company; also for the reason that it does not appear by the said complaint that the plaintiff has made earnest or any effort to obtain redress at the hands of the directors and shareholders or of the directors of the corporation, or at the hands of these defendants or any of them, and also for the reason that it does not appear by the said complaint that the ownership of the plaintiff's stock in the said Mining Company was vested in him at the time of the transaction of which he complains, or was thereafter transferred to him by operation of law.

SECOND. That there is a defect of parties defendant in that the vendor of the mining claims and property of said Las Neuve Minas de Santa Maria Gold and Silver Mining Company, mentioned in the said complaint, is not made a party defendant to this action.

THIRD. That causes of action have been improperly united in the complaint herein, and that said causes of action are not brought to recover upon claims arising out of the same transaction or transactions connected with the same subject of action, and do not all belong to one of the subdivisions of Section 484 of the Code of Civil Procedure, and that said causes of action are not consistent with each other and that said causes of action do not affect all the parties to this action.

The causes of action that have been so improperly united in the said complaint are the following:

A supposed liability on the part of each one of the defendants other than the said Las Neuve Minas de Santa Maria Gold and Silver Mining Company, to respond to the said Mining Company for the difference between twenty-five millions dollars and the value of the mining claims and property referred to in the said complaint.

A supposed liability on the part of each one of the defendants other than the said Las Neuve Minas de Santa Maria Gold and Silver Mining Company who received stock from the vendor of the said mining claims and property mentioned in the said complaint to account to the said Company for the par value of the stock so received by each one of the said defendants respectively, less the proportionate value of the said mining claims.

A supposed liability that each one of the defendants, other than the said Las Neuve Minas de Santa Maria Gold and Silver Mining Company should respond in damages to the said Company, or to plaintiff and other stockholders for representing that the stock purchased by the plaintiff and other stockholders was full-paid stock.

A supposed liability that each one of the defendants, other than the said Las Neuve Minas de Santa Maria Gold and Silver Mining Company, should respond to the said Company, or to the plaintiff and the other stockholders of the said Company for the profits of each one of the said defendants upon the sales of his shares of stock in said Company.

FOURTH. The the complaint does not state facts sufficient to constitute a cause of action against the defendant Frederick D. Grant.

July 13th, 1883.

DAVIES, WORK, McNAMEE & HILTON,
Atiorneys for defendant FREDERICK D. GRANT,
2 Wall Street, N. Y.

(Indorsed): Supreme Court. Eliphalet Nott, who sues, &c., vs. Frederick D. Grant, impleaded, &c. Copy. Demurrer. Davies, Work, McNamee & Hilton, Attorneys for deft. Grant, United Bank Building, Wall St. & Broadway, New York.

Supreme Court of the State of New York—For the City and County of New York.

ELIPHALET NOTT, who sues on behalf of himself, and of all others who shall come in and be made parties to this action, and contribute to the expenses thereof,
Plaintiff,
against
HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY,
Defendants.

Petition for Removal.

To the Honorable the Supreme Court of the State of New York:

The petition of John B. Alley, respectfully shows that he is one of the defendants in the above entitled action, which was commenced on or about the second day of March, 1883, and is now pending in the

said court, and that at the time of the commencement of this action the plaintiff was, and still is, a citizen and resident of the State of New York; and that at the time of the commencement of this action the defendant, Las Nueve Minas de Santa Maria Gold and Silver Mining Company was and still is a corporation organized under the laws of the State of New York, and a citizen of said State; and that at the time of the commencement of this action this petitioner was and still is a resident and citizen of the State of Massachusetts.

Your petitioner further avers that the matter in dispute in this action exceeds the sum or value of five hundred dollars, exclusive of costs, and that the plaintiff claims in his complaint an accounting by your petitioner and the payment by him of about twenty-four million five hundred thousand dollars, and an accounting and payment of certain alleged large gains and profits, alleged by the plaintiff to have been received by this petitioner upon the sales of certain stock of the Las Nueve Minas de Santa Maria Gold and Silver Mining Company; and your petitioner for greater certainty refers to a copy of the plaintiff's complaint in this action which is hereunto annexed, and prays that the same may be taken as a part of this petition.

Your petitioner further avers that the controversy in this suit or action, so far as it respects or is between the plaintiff individually or as representing the said Mining Company and this petitioner, is wholly between citizens of different States, and that the same can be fully determined and a final determination of the controversy in said action can be had, so far as concerns the plaintiff and this petitioner, without the presence of either of the other defendants or parties in said cause.

Your petitioner further avers that he and the defendants Clews, Selover, and Shryock separately demurred to the complaint of the plaintiff herein, and that after the argument of said demurrers the same were overruled by the Special Term of this Court, with leave to said last named defendants to answer the complaint within twenty days upon withdrawing said demurrers and paying the costs thereon, and that an order and also an interlocutory decree were duly entered in conformity with said decision, and that this petitioner and the other defendants last named duly appealed from the said interlocutory decree to the General Term of this Court, and that thereafter this petitioner and the last named defendants caused to be duly served an affidavit and a notice of motion to stay the proceedings of the plaintiff in this action, pending such appeal. That thereafter this petitioner and said last named defendants obtained an order from the Hon. Charles Donohue, a Justice of this Court, extending the time within which the said last named defendants might withdraw their said appeals and demurrers, and answer the complaint until ten days after the hearing and decision of said motion for a stay pending appeal.

Your petitioner further avers that within the time fixed by this Court therefor this petitioner and the defendants Clews, Selover, and Shryock have duly withdrawn their appeal from said interlocutory judgment, and have paid to the attorney for the plaintiff the costs of said appeal, and they have also duly withdrawn their said demurrers, and have paid to the plaintiff's attorney the costs awarded to the plaintiff in and by said interlocutory decree, and on the 1st day of August, 1883, the said last named defendants served their separate

answers to the complaint in this action in and by which each and every material allegation of the complaint whereby the defendants or either of them is charged with any liability is denied and put in issue.

That since the service of said answer there has been no term of this Court at which this action could have been tried.

That the said Frederick D. Grant has served a demurrer to said complaint, and that the same remains undetermined as to him, and that since the service of said demurrer there has been no term of this Court at which the same could have been tried.

That your petitioner desires to remove this suit before trial thereof into the next Circuit Court of the United States for the Southern District of New York, being the district where said suit is pending in the Second Circuit in pursuance of the Revised Statutes of the United States and of the Act of Congress, entitled "An act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State Courts and for other purposes," approved March 3, 1875, and that your petitioner is ready and willing to make and file herewith a bond with good and sufficient surety for his entering in such Circuit Court on the first day of its session next after the filing of this petition and after the order of this Court removing said suit to the said Circuit Court, a copy of the record in such suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, and for doing all other acts and things required to be done by the Revised Statutes of the United States and by the said Act of Congress in such case made and provided, and he offers herewith a bond executed by himself as principal and George D. Roberts as surety, in the penal sum of one thousand dollars, conditioned that your petitioner shall enter in such Circuit Court on the first day of its session next after the filing of this petition and the order removing said suit to said Circuit Court, a copy of the record in such suit and for paying all costs that may be awarded by said Circuit Court if said Circuit Court shall hold said cause was wrongfully or improperly removed thereto, and for doing such other appropriate acts as by the Statutes of the United States and by the said Act of Congress in such case made and provided are required to be done.

And your petitioner therefore prays this Court to accept this petition, and prays that said bond be accepted as good and sufficient surety according to said provisions of law, and that said suit may be removed into the next Circuit Court of the United States to be held in the Southern District of New York in the Second Circuit pursuant to the Statutes made and provided, and that no further proceedings may be had therein in this Court.

And your petitioner will ever pray, &c.

And your petitioner further shows that no previous application has been made for the relief and order now sought.

Dated August 1st, 1883.

JOHN B. ALLEY,
Petitioner.

ABBOTT BROTHERS,
Attorneys for Petitioner,
71 Broadway, New York.

STATE, CITY AND COUNTY OF NEW YORK, SOUTHERN DISTRICT OF NEW YORK, *ss.:*

JOHN B. ALLEY being duly sworn, says that he is the John B. Alley, petitioner named in the foregoing petition; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

JOHN B. ALLEY.

Subscribed and sworn to before me, this 1st day of August, 1883.

JAS. T. F. RANDOLPH,

[SEAL OF NOTARY.] *Notary Public Kings Co.*

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court, City and County of N. Y. Eliphalet Nott, who sues, &c., against Henry Clews and others, impl., &c. Petition of deft. Alley for removal. Abbott Bros., Att'ys for deft. Alley, 71 Broadway, N. Y. Filed August 2, 1883.

Supreme Court of the State of New York—City and County of New York.

ELIPHALET NOTT, who sues on behalf, etc., *Plaintiff,*

against

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT and LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY. *Defendants.*

Bond for removal to U. S. Court.

We, John B. Alley, of Lynn, Massachusetts, as principal, and George D. Roberts of No. 49 Park Avenue in the City of New York, as surety, are held and firmly bound unto Eliphalet Nott, the above-named plaintiff, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Eliphalet Nott, or to his successors, representatives or assigns, for which payment well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the first day of August, 1883.

Whereas, a suit was brought on or about the 2nd day of March, 1883, in the Supreme Court of the State of New York, for the City and County of New York, by the said Eliphalet Nott, against the said John B. Alley and others, and the same is now pending for trial in said City and County of New York, and is removable into the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, under the Revised Statutes of the United States, and under the Act of Congress entitled an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of

causes from State Courts, and for other purposes, approved March 3, 1875.

And whereas, the said John B. Alley has filed his petition in the said Supreme Court of the State of New York, for the City and County of New York for the removal of said suit into the next Circuit Court of the United States, to be held in the Southern District of New York, pursuant to the said Statutes of the United States in such case made and provided.

Now, therefore, the condition of this obligation is such that if the above bounden John B. Alley, or his legal representatives shall enter or cause to be entered in the Circuit Court of the United States for the Southern District of New York, on the first day of its stated session next ensuing after the filing of the said petition, a copy of the record in such suit, and shall pay all costs that may be awarded by the said Circuit Court, if the said Court shall hold that such suit was wrongfully or improperly removed thereto, and cause to be done such other appropriate acts as by the Revised Statutes of the United States and the said Act of Congress are required to be done upon the removal of a suit into the United States Circuit Court, then the above obligation to be void, otherwise to remain in full force and virtue.

(Sg.) JOHN B. ALLEY, [L. S.]
G. D. ROBERTS, [L. S.]

Executed in presence of J. T. F. RANDOLPH.

STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK, *ss.:*

George D. Roberts being duly sworn, says that he is the surety named in the foregoing bond; that he resides at No. 49 Park Ave., New York City; that he is a resident and a freeholder within the State of New York, and is worth the sum of two thousand dollars over and above all his just debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

(Sg.) G. D. ROBERTS.

Subscribed and sworn to before me this 1st day of August, 1883.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK, *ss:*

On this 1st day of August, 1883, before me personally came John B. Alley and George D. Roberts, known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they had executed the same.

JAS. T. F. RANDOLPH,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

(Indorsed): Supreme Court—City and County of New York. Eliphalet Nott, who sues, &c., agst. Henry Clews and others, impld. &c., Copy. Bond on Removal. Abbott Bros., atty's for def't Alley, 71 Broadway, N. Y. Filed August 2, 1883.

The within bond is hereby accepted and approved.

C. DONOHUE.

At a Special Term of the Supreme Court of the State of New York, held at Chambers thereof in the County Court House in the County of New York on the 2d day of August, 1883.

Present, Hon. Charles Donohue, Justice.

ELIPHALET NOTT, who sues as well as, etc.,
against
HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER of Chicago, Illinois, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, and LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

On reading and filing the pleadings in this action and the petition of the defendant John B. Alley verified on the first day of August, 1883, praying for the removal of this suit into the Circuit Court of the United States for the Southern District of New York, in pursuance of the laws of the United States relative to the removal of suits from the State Courts, and upon filing the bond with good and sufficient surety offered by him according to the requirements of said laws, and on motion of Abbott Brothers, attorneys for the defendant John B. Alley,

It is ordered that said bond and said petition be accepted and that said suit be removed into the Circuit Court of the United States for the Southern District of New York in the Second Circuit, and that no further proceedings be had in this Court.

(Indorsed. Filed Aug. 2, 1883.)

STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK, *ss.:*

I, PATRICK KEENAN, Clerk of the said City and County and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Pleadings, Record of the Cause, Petition and Bond and the endorsement thereon, and Order of Removal on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 2d day of August, 1883.

[SEAL.] PATRICK KEENAN,
Clerk.

(Indorsed): N. Y. Supreme Court. Eliphalet Nott, who sues as well, &c., against Henry Clews, impleaded, &c. Order removing suit into United States Circuit Court. Abbott Brothers, Attorneys for John B. Alley, Petitioner & Def't, 71 Broadway, N. Y.

(Indorsed): Supreme Court, City and County of New York. Eliphalet Nott, who sues, &c., agst. Henry Clews, John B. Alley, Abia A. Selover and Lee R. Shryock, impl. with others. Certified Copy Record of the Cause, Petition for Removal, Bond and Order of Removal. Abbott Bros., Att'ys for J. B. Alley, Petitioner, 71 Broadway, N. Y.

(Endorsed): Filed August 2, 1883. U. S. Circuit Court. Filed August 2d, 1883. Timothy Griffith, Clerk.

Circuit Court of the United States, For the Southern District of New York.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS et al. } In Equity.

Please to take notice that on the annexed affidavit of Horatio F. Averill, the plaintiff's attorney, the petition, bond and order for the removal of this cause from the Supreme Court of the State of New York and upon the pleadings, and all other papers served or filed and proceedings taken herein, a motion will be made at a term of this Court to be held at the United States Post Office and Court Building, in the City of New York, on the 19th day of October instant, at the opening of the Court on that day, or as soon thereafter as counsel can be heard for a rule or order dismissing all proceedings in this action and remanding the same and the record therein to the Supreme Court of the State of New York, or for such further order or relief in the premises as to the Court may seem meet.

Dated New York, October 11th, 1883.

Yours, &c.,
H. F. AVERILL,
Plaintiff's Attorney.

To ABBOTT BROTHERS, Esqs.,
Attorneys for defendants CLEWS and others.
R. H. SPENCER, Esq.
Attorney for defendant SHRYOCK.
DAVIES, WORK, MCNAMEE & HILTON, Esqs.,
Attorneys for defendant GRANT.

Circuit Court of the United States, For the Southern District of New York.

ELIPHALET NOTT, who sues, &c.,
against
HENRY CLEWS et al. } In Equity.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

HORATIO F. AVERILL, of the City of New York, in said District, being duly sworn, says that he is the attorney and solicitor for the plaintiff in this action, and that he appears herein in this Court for the purpose of moving to dismiss the proceedings in this Court and

to remand the cause and the record therein to the Supreme Court of the State of New York, in which the suit was commenced as hereinafter stated.

Deponent further says that this action was commenced in the Supreme Court of the State of New York on or about the 2d day of March, 1883, by the service of summons and complaint herein on all the defendants except the defendants A. B. Meeker and Henry H. Honore, who could not be found within the jurisdiction of that Court, and by service on the defendant John B. Alley, on March 15th, 1883.

That the time for the defendants Henry Clews, John B. Alley, Lee R. Shryock and Abia A. Selover to plead was extended from time to time until on or about the 29th day of March, 1883, when the demurrers of said defendants Clews, Alley and Selover were served, and on March 31st, 1883, the demurrer of defendant Shryock was served. That the issues of law raised by said demurrers of said defendants Clews, Alley, Shryock and Selover were duly noticed for trial and tried at a Special Term of the said Supreme Court of the State of New York, held at the Court House, in the City of New York, on the 4th day of June, 1883, and an order overruling said demurrers was duly made and entered and an interlocutory judgment in pursuance thereof was duly entered in said Supreme Court of the State of New York, on the 9th day of June, 1883, and copies thereof were on the same day duly served on the attorneys for said defendants respectively.

Deponent further says that the principal controversy in this action is between the defendant corporation and its stockholders on the one side and all the individual defendants as its original trustees on the other, growing out of an alleged unlawful disposition of its capital stock by such defendants, while acting as trustees of the corporation, in pursuance of an agreement to which, as it is alleged, they were all parties, and by which the stock was issued, and the same, or a large portion thereof was turned over to them and their associates on payment of a nominal price, which is alleged in the complaint to have been not over five per cent. of the par value of the stock, and also for jointly representing to the public in their official capacity that the stock was full paid, whereby the corporation was estopped from denying that the stock was full paid, and for distributing the stock to the public as full-paid stock.

That only one cause of action is set out in the complaint, which is for the joint misconduct of the individual defendants in their capacity as trustees of the corporation defendant.

Deponent further says that the order of the said Supreme Court made at a Special Term thereof on August 2, 1883, approving the petition for the removal of this cause into this Court and the accompanying bond, and ordering that this cause be removed accordingly was granted *ex parte*.

Deponent further says that the defendants Henry Clews, Frederick D. Grant, and also, as he verily believes, the defendant Shryock are citizens of the State of New York, and that the defendant Las Neuve Minas de Santa Maria Gold and Silver Mining Company is a corpo-

ration formed under the laws of the State of New York, having its principal office and place of business in the City of New York.

HORATIO F. AVERILL.

Sworn to before me this 11th day of October, 1883.

THOS. ALEXANDER, Jr.,

[SEAL.] *Notary Public, N. Y. Co.*

(Indorsed): U. S. Circuit Court. Eliphalet Nott, who sues, &c., against Henry Clews & ors. Affidavit and Notice of Motion to remand. H. F. Averill, Plaintiff's Attorney, 120 Broadway, N. Y. City.

New York, Oct. 10, 1883. Service of a copy of the within notice is this day admitted.

DAVIES, WORK, McNAMEE & HILTON.

Oct. 11, 1883. Abbott Bros., Att'ys for def'ts Clews, Alley & Selover.

U. S. Circuit Court. Filed Dec. 10, 1883. Timothy Griffith, Clerk.

U. S. Circuit Court for the Southern District of New York.

ELIPHALET NOTT, who sues, &c.
against
HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

CITY AND COUNNY OF NEW YORK, *ss.:*

ALBERT A. ABBOTT, being duly sworn, says, that he is one of the attorneys and of counsel for the defendants, Clews, Alley and Selover, and of counsel for the defendant, Shryock, in the above entitled action.

That as deponent is informed and believes neither the summons nor the complaint in this action have ever been served upon the defendants, Henry H. Honore or A. B. Meeker.

Deponent further says that he has read a copy of the affidavit of Horatio F. Averill verified on the 11th day of October, 1883, and that the statements contained in folios number seven and eight thereof are not true in so far as they are inconsistent with the complaint in this action.

Deponent further says that while it is true that an order was made in this action, *ex parte*, by the Special Term of the Supreme Court for the City and County of New York, on the 2d day of August, 1883, that the bond and petition for the removal of this cause be accepted, and that this suit be removed into the Circuit Court of the United States for the Southern District of New York, nevertheless the plaintiff, by his attorneys, thereafter moved in said Supreme Court to vacate said order of removal, and the said motion having been heard and considered was denied by said Supreme Court by an order entered as of the 12th day of September, 1883.

Deponent further says that he has examined the books of the defendant Mining Company and from such examination he is informed and believes that the plaintiff in this action, or some one bearing the same name, is the owner of three hundred shares of the stock of said company, and that on or about the 13th day of June, 1883, the plaintiff presented certificates for that number of shares, assigned to him or in blank by one Daniel Hurley, trustee, which said certificates were issued to said Hurley, trustee, on or about the 10th day of June, 1883.

Deponent further says that a copy of the record in this cause was duly filed and entered in this court on the 2d day of August, 1883.

A. A. ABBOTT.

Sworn to before me this 19th day of October, 1883.

JAS. T. F. RANDOLPH,

[SEAL.] *Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

(Indorsed): U. S. Circuit Court, So. Dist. of New York. Eliphalet Nott against Henry Clews, et al. Affidavit of Albert A. Abbott. Abbott Brothers, attorneys for def't Clews, et al, 71 Broadway, New York, N. Y.

U. S. Circuit Court. Filed December 10, 1883.

TIMOTHY GRIFFITH,
Clerk.

Circuit Court of the U. S.—Southern District of New York.

ELIPHALET NOTT

agst.

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, AND LAS NUEVE DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

CITY AND COUNTY OF NEW YORK, *ss.:*

ALBERT A. ABBOTT, being duly sworn, says that in the year 1883, as well as in the fourteen years theretofore, there was no term of the Supreme Court for the City and County of New York, for the trial or argument of demurrers or issues of law or of fact in the months of July, August or September.

(Sg.) A. A. ABBOTT.

Sworn to before me this 5th day of November, 1883.

JAS. T. F. RANDOLPH,

[SEAL OF NOTARY.] *Notary Public, Kings Co.*

Certif. filed in N. Y. Co.

(Indorsed): U. S. Cir. Ct.—So. Dist. of N. Y. Eliphalet Nott vs. Henry Clews and ors. Aff. of A. A. Abbott. Abbott Bros., atty's for def't Clews and ors., 71 B'way, N. Y. City.
U. S. Circuit Court. Filed Dec. 10, 1883.
TIMOTHY GRIFFITH,
Clerk.

United States Circuit Court—Southern District of New York.

BOYD VS. GILL and others.
CUTTIER VS. WHITTIER and others.
NOTT VS. CLEWS and others.
PERKINS VS. DENNIS and others.

Before WALLACE and BROWN, JJ.

WALLACE, J.:

These cases and the case of Langdon *vs.* Fogg, decided by Judge Brown, but in which he ordered a re-argument, have been heard together, the questions being substantially identical, upon motions to remand the suits to the State Court. In each case the action was brought in the State Court by a resident plaintiff against a non-resident defendant and several resident defendants, and was removed to this Court upon the petition of the non-resident defendant. The right to a removal is challenged upon the ground that there is not a controversy in the suit which is wholly between the plaintiff and the non-resident defendant, and which can be fully determined between them within the meaning of the second section of the Removal Act of March 3, 1875. There are some immaterial differences in the allegations of the bills of complaint in the several cases, but the bill in each may be fairly treated as one brought by a stockholder in a mining coporation to enforce a cause of action which exists in favor of the corporation against the directors for a fraudulent appropriation of its assets, but which the corporation does not assert because it is controlled by the unfaithful directors, and the directors and corporation are consequently joined as defendants.

The relief sought is that the individual defendants account jointly and severally concerning the profits they have made by the misappropriation of the corporate property, and be adjudged to pay the amount found due to the corporation into court for the benefit of the stockholders.

This being the cause of action disclosed by the bill it will be treated as one upon which a separate action could be maintained as between the plaintiff and the non-resident defendant.

The rule may now be deemed established that where a *cestui qui trust* seeks in equity to charge trustees with personal liability for their fraudulent acts he may join all who have participated, or proceed against one or more of them severally at his election. The right of action in such a case arises *ex delicto*, and in equity as well as at law the tort may be treated as several as well as joint. Heath *vs.* Erie Railway Co., 8 Blatch. 347; May *vs.* Selby, 1 Y. & Coll. Ch. 235; France *vs.* France, 3 Ves. 75; Wilkinson *vs.* Parry, 4 Russ. 272;

Attorney-General *vs.* Corporation of Leeds, 4 Lond. Jur. 1174. A proceeding against trustees for a fraudulent breach of trust is an exception to the rule that in a suit against trustees all of them must be made parties. Cunningham *vs.* Pell, 5 Paige, 607. The reason is obvious. A trustee may insist that his co-trustees be joined when he is sued for a breach of duty in which the other trustees are involved because he is entitled to contribution. In cases of breach of trust, not involving actual fraud, contribution may be enforced by trustees as between themselves. (Hill on Trustees, 814, Notes 4th Am. Ed.) But no right of contribution exists where the demand sought to be enforced is *ex delicto*. Peck *vs.* Ellis, 2 John, Ch. 131; Miller *vs.* Fenton, 11 Paige, 18. The cause of action disclosed by the bill is therefore one capable of being determined as between the plaintiff and the non-resident defendant without the presence of the other defendants.

The plaintiff, at his election, can dismiss his bill as against all the other defendants at any stage of the action, and proceed against the non-resident defendant alone, and obtain against him the complete relief to which he would be entitled if the other defendants were joined.

The question, then, is whether the Act of 1875 gives the right of removal whenever there is a cause of action in the suit between a resident party on the one side and a non-resident party on the other upon which a several recovery may be had against the latter, or whether the right exists only when there is a separate and distinct controversy to which all the substantial parties on one side are residents, and all those upon the other are non-residents. The language of the act declares that when in "any suit * * * between citizens of different States * * * there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants * * * may remove, &c." Two diverse views of the meaning of this language are indicated by the adjudications of the Federal Courts. In Peterson *vs.* Chapman, 13 Blatch., 395, the action was one of trover in which the plaintiff was a citizen of New York, and the defendants were one a citizen of New York and one a citizen of Connecticut. It was held that although the cause of action was such that the suit could be maintained by the plaintiff against either defendant alone it was not a removable suit because all the parties to the controversy were not residents upon the one side, and non-residents upon the other; and that the plaintiff having elected to proceed against all jointly the case disclosed but a single controversy, and that was one which could be fully determined only between all the parties to the suit. This decision was approved and followed by other judges in this circuit in Sawyer *vs.* Switzerland Ins. Co., 14 Blatch., 456, and Van Brunt *vs.* Corbin, do.. 496. The latter case was an action of ejectment, and one therefore in which the plaintiff, at his election, might have proceeded against the defendants severally instead of jointly. The more recent case of Tuedt *vs.* Carson, 13 Fed. Rep., 353, in the eighth circuit is to the same effect. That was an action brought by the plaintiff against several defendants for a tort. Some of the defendants were residents of the same State with the plaintiff, and others were residents of a different State. It was held

not to be such a separable controversy that the non-resident defendants could remove the case, although the plaintiff could, at his election, have proceeded against them alone.

On the other hand, Clark *vs.* Chicago, &c., Railway Co., 11 Fed. Rep. 355; Kerling *vs.* Cotzhausen, 16, do., 705. The people ex. rel., &c., vs. Illinois Central R. R. Co., 16 do., 881, are authorities for the broad proposition that whenever the suit is founded on a cause of action upon which at the election of the plaintiff the defendants might have been sued severally a non-resident can remove the suit, although the other defendants with whom he is sued jointly are residents of the same State as the plaintiff. It is urged that since the decisions in this circuit referred to the Supreme Court has considered the construction of the second clause of the second section of the Act of March 3, 1875, and in the light of its decision in Barney *vs.* Latham, 103 U. S., 205, the former judgments of this Court should be reconsidered, and it should now be decided that whenever in a suit between a resident plaintiff and several defendants one only of whom is a non-resident, there is a cause of action which might be fully determined as between the plaintiff and the non-resident defendant if the other defendants were not parties, the suit is removable. Barney *vs.* Latham does not seem to sanction any such contention. Some misapprehension of that decision may have arisen by overlooking the distinction between a separable cause of action and a separate or separable controversy. The cases in the seventh and eighth circuits seem to interpret that decision as holding that whenever a separate action could have been maintained by the plaintiff upon the cause of action sued upon against one of the several defendants, as to such defendant there is a separate or separable controversy in the suit.

In Barney *vs.* Latham there were two separate and distinct controversies as to one of which the requisite diversity of citizenship existed between all the parties to it, plaintiff and defendant, to authorize a removal of the suit. Speaking of this controversy the Court, through Mr. Justice Harlan, say that "such a controversy does not cease to be one wholly between the plaintiffs and the defendants because the former for their own convenience choose to embody in their complaint a distinct controversy between themselves and other defendants." That decision was commented on in the subsequent case of Hyde vs. Ruble, 104 U. S., 407, and its result is tersely and clearly stated by the Chief Justice, as follows: "To entitle a party to removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other. Thus in Barney *vs.* Latham two separate and distinct controversies were directly involved: one as to the lands held by the Winona & St. Peter Land Co., in respect to which the land company was the only necessary party on one side, and the plaintiff on the other; and the second as to the moneys collected from the sales of lands before the land company was formed, as to which only the natural persons named as defendants were the necessary party on the one side and the plaintiffs on the other; one was a controversy about the land, and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes

of action, and complete relief afforded in such suit as to the particular controversy involved. In that about the land the land company would have been the only necessary defendant, and in that about the money the natural persons need only have been brought in. In that about the land there could not have been a removal because the parties on both sides would have been citizens of the same State; while in that about the money there could have been, as the plaintiffs would all be citizens of one State while the defendants would all be citizens of another."

It does not necessarily follow that a controversy is wholly between a plaintiff and each one of several defendants and can be fully determined as between them merely because such a controversy might have been presented if the plaintiff had elected to present it in that form. The controversy in a suit is the one which is actually presented, not the one that might have been. It is not wholly between the plaintiff and one of the defendants, because it might have been if the plaintiff had so elected. Nor can a controversy be fully determined between a plaintiff and one of the defendants when in the form and substance which it has assumed the plaintiff insists, and has a right to insist, that so far as he is concerned it shall be determined as to both of the defendants. The controversy is the claim in form and substance as it is presented for determination; and if a joint recovery against several defendants is claimed upon a cause of action which justifies a joint recovery the controversy is between the plaintiff and all the defendants against whom the claim is asserted. The opinions of Judge Johnson in Peterson *vs.* Chapman, and of Judge Treat in Tuedt *vs.* Carson are replete with satisfactory reasons against such a construction of the removal act as is insisted upon. There seem to be no controlling reasons therefore for receding from the former decisions in this circuit.

It remains to consider whether under the bill here which seeks a decree that the defendants account severally concerning the gains and profits received by each through the fraudulent acts complained of, there is not a controversy which is separate as between the plaintiff and each defendant, and which can be fully determined as between them. If the defendant has elected to pursue each defendant separately, and the cause of action disclosed by the bill justifies him in doing so, it would seem that the suit presents a separate controversy as to that defendant, notwithstanding there is also a controversy between the plaintiff and all the defendants jointly. If this separate controversy can be fully determined between the plaintiff and defendant without the presence of the other defendants, the language of the removal act is satisfied. That it can be thus determined has already been shown, because the other trustees are not necessary parties to a suit brought against one for a fraudulent breach of trust. There is therefore a distinct controversy here between the plaintiff and each defendant. Some of the transactions assailed by the bill are not joint transactions on the part of the defendants. All of the defendants may not be liable to the same extent. The prayer as to this branch of the bill is against each defendant for a several accounting, and that is only necessary upon the theory that some of them are liable for a different amount than others.

It is no answer to the suggestion that the suit presents a separate and distinct controversy as between the plaintiff and each defendant to assert that the decree obtained will be a single decree as to all the defendants. The same thing may be said of every decree in suits in equity, and could have been said in Barney *vs.* Latham.

For these reasons the actions were properly removed.

In the case of Nott *vs.* Clews, the additional point is made that the petition for removal was not filed by the removing defendant before the trial of the cause. As to four of the defendants separate demurrers were interposed and brought to a hearing. The demurrers were overruled, but leave was given to the defendants to answer upon payment of costs of the demurrers within twenty days.

As the removal was at the instance of one of the defendants who demurred, it is not material that when the demurrer was heard service of process had not been made on some others of the parties named as defendants. If the cause was not in a condition to be heard on demurrer the objection should have been taken in time. As it is, after the removing defendant has elected to treat the action as severed, he cannot now be heard to say that the hearing and decision upon the demurrer is to go for nothing.

The real question is whether the hearing and decision of a cause upon a demurrer is a trial of the cause within the meaning of the removal act. This precise question has been decided adversely to the defendant by Judge Benedict in Langdon *vs.* Fiske, and it was there held that such a hearing was a trial which precluded the subsequent removal of the suit. It was not held in that case that the hearing upon a special demurrer or one which is addressed to merely formal objections in a bill or complaint is a trial within the contemplation of the act. But if a defendant chooses to have the action tried upon the pleadings instead upon issues of fact it is his right to do so, and the decision is a final determination of the action unless in the discretion of the Court a new pleading is permitted. By the Code of this State and a large number of other States, the hearing of a demurrer is the trial of an issue of law. The term trial has thus acquired a more enlarged signification than it possessed when Blackstone defined it as "the examination of the matter of fact in issue in a cause." Babbitt *vs.* Clark, 103 U. S., is authority for the proposition that the trial of a cause upon an issue of law is a trial which will preclude the removal of the suit afterwards. In this case, therefore, the motion to remand is granted; in the other cases it is denied.

Brown, J., concurs in the results.

(Indorsed): U. S. Circuit Court, Southern Dist. of N. Y. Eliphalet Nott, &c., *vs.* Henry Clews and others. Opinion of Wallace, J., on motion to remand. Filed Dec. 14, 1883.

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Friday, the twenty-first day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable WILLIAM J. WALLACE, Circuit Judge.

ELIPHALET NOTT, for himself and others,
Plaintiff,

against

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY. *Defendants.*

A motion to remand the above-entitled action coming on duly to be heard on a notice of motion dated the 11th day of October, 1883, and after reading and filing plaintiff's said notice of motion and the affidavit of Horatio F. Averill, dated October 11, 1883, with due admissions of service upon the attorneys for the defendants herein, and the defendants' petition undertaking the order of removal herein, the record brought from the Supreme Court of the State of New York, and filed herein on the 2nd day of August, 1883, and the affidadavits of Albert A. Abbott, dated respectively October 19, 1883, and November 5, 1883, and after hearing George F. Betts, counsel for plaintiff for the motion and Albert A. Abbott, Esq., and Julian T. Davies, Esq., in opposition thereto,

It is ordered that the said motion be granted and that the above-entitled action be and the same hereby is remanded to the Supreme Court of the State of New York.

WM. J. WALLACE.

N. Y., Dec. 19, 1883.

GENTLEMEN: You will please take notice that I will present the within proposed order for settlement to the Hon. William J. Wallace, Judge of the U. S. Circuit Court at a term of this Court to be held at the U. S. Court and Post Office Building in the City of New York, on the 21st day of December inst., at the opening of Court on that day or as soon thereafter as counsel can be heard.

Yours, &c.,
HORATIO F. AVERILL,
Plffs. Att'y.

Dated N. Y., Dec. 19th, 1883.

To Messrs. ABBOTT BROS.,
Atty's for CLEWS, *et al.*

Messrs. DAVIES, WORK, MCNAMEE and HILTON,
Att'y for GRANT, *et al.*

(Indorsed): U. S. Circuit Court—Southern District of New York. Eliphalet Nott for himself and others, plaintiff, against Henry Clews

& others, defendants. Order remanding cause to New York Supreme Court and notice. H. F. Averill, Attorney for Plaintiff, 35 Broadway, N. Y. City.

Due and timely service of the within notice and proposed order is hereby admitted.

N. Y., Dec. 19, 1883.

ABBBOTT BROS.,
Atty's for certain defts.

DAVIES, WORK, MCNAMEE and HILL,
Atty's for deft. GRANT.

U. . Circuit Court. Filed Dec. 21, 1883.

TIMOTHY GRIFFITH,
Clerk.

Circuit Court of the United States for the Southern District of New York.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,
Plaintiff,

against

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, LAS NUEVE MINAS DE SANTA MARIA GOLD AND SILVER MINING COMPANY.
Defendants.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Appeal of the above-named JOHN B. ALLEY, defendant and appellant, respectfully showeth:

That this action was commenced in the Supreme Court for the City, County and State of New York, on or about the second day of March, 1883, and purports to be brought to compel an accounting and the payment of certain gains and profits alleged to have been received by this defendant upon sales of stock of the defendant Mining Company, while this defendant was one of its trustees; and to obtain the appointment of a receiver to take and distribute the amount recovered among the creditors and stockholders of said Company, and for other purposes.

That on the 2d day of August, 1883, this defendant filed and presented in the said Supreme Court his petition and bond in due form of law for the removal of this cause into the Circuit Court of the United States for the Southern District of New York, and thereupon, by the said Supreme Court, the said bond was approved and an order duly made and entered removing this cause into said Circuit Court.

That thereafter, on said 2d day of August, 1883, a copy of the record in this cause was duly filed in said Circuit Court.

That on the 21st day of December, 1883, an order was made by the said Circuit Court, and entered therein, remanding this cause to the Supreme Court of the State of New York.

Wherefore, this defendant appeals from the whole of said last mentioned order, and prays that the pleadings, proofs, proceedings and order remanding this cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court proceed to review the said order of the Circuit Court of the United States for the Southern District of New York, remanding this cause to the Supreme Court of the State of New York, and that the said order be reversed, and that the said Circuit Court may be directed to proceed with this cause as though the same had been originally commenced therein, and for such other order or relief as to the said Supreme Court shall seem just.

Dated December 28, 1883. ABBOTT BROTHERS,
Solicitors for Appellant.

ALBERT A. ABBOTT,
Counsel.

Appeal allowed December 28, 1883.
ADDISON BROWN.

(Indorsed): U. S. Circuit Court—Southern District of New York. Eliphalet Nott, &c., against Henry Clews and John B. Alley et al. Appeal to Supreme Court. Abbott Bros, Solrs. for Appellant.

Service of a copy of the within petition of appeal is admitted this 28th day of December, 1883.

HORATIO F. AVERILL,
Att'y for Plaintiffs,
U. S. Circuit Court.

Filed Dec. 28, 1883.
TIMOTHY GRIFFITH,
Clerk.

Circuit Court of the United States of America for the Southern District of New York in the Second Circuit.

ELIPHALET NOTT, who sues on behalf of himself and of all others who shall come in and be made parties to this action and contribute to the expenses thereof,

vs.

HENRY CLEWS, JOHN B. ALLEY, A. B. MEEKER, LEE R. SHRYOCK, HENRY H. HONORE, ABIA A. SELOVER, FREDERICK D. GRANT, AND LAS NUEVE DE SANTA MARIA GOLD AND SILVER MINING COMPANY.

} Bond for Costs.

Know all men by these Presents that we, Charles M. Foster, residing at No. 208 East 116th Street, in the City of New York, and William A. Abbott, residing at No. 213 Schermerhorn Street, in the City of Brooklyn, New York, are held and firmly bound unto the above-named Eliphalet Nott in the sum of five hundred dollars, to be paid to the said Eliphalet Nott, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the 27th day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, the above-named John B. Alley hath prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above-entitled suit by the Judges of the Circuit Court of the United States for the Southern District of New York, remanding this cause to the Supreme Court of the State of New York,

Now, therefore, the condition of this obligation is such, that if the above-named John B. Alley shall prosecute his appeal to effect and answer all costs if he fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.) C. M. FOSTER. [L. S.]
WILLIAM A. ABBOTT. [L. S.]

Sealed and delivered, and taken and acknowledged, this 27th day of December, 1883, before me,

JAS. T. F. RANDOLPH,
[SEAL OF NOTARY.] *Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK, *ss.:*

CHARLES M. FOSTER and WILLIAM A. ABBOTT being duly sworn, each deposes and says that he is a resident of the State of New York, and

that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

(Sg.) C. M. FOSTER.
WILLIAM A. ABBOTT.

Sworn to this 27th day of December, A. D. 1883, before me,

JAS. T. F. RANDOLPH,
[SEAL OF NOTARY]. *Notary Public, Kings Co.*
Certificate filed in N. Y. Co.

(Indorsed): U. S. Circuit Court. Eliphalet Nott, &c., vs. Henry Clews, John B. Alley and others. Copy. Bond for Costs on appeal. Abbott Brothers, solicitors for appellant, 71 Broadway, N. Y.

The within bond is approved as to form and sufficiency.
December 28, 1883. ADDISON BROWN.
U. S. Circuit Court. Filed Dec. 28, 1883.
TIMOTHY GRIFFITH,
Clerk.

By the Honorable ADDISON BROWN, one of the Judges of the Circuit of the United States, for the Southern District of New York.

To ELIPHALET NOTT:

WHEREAS, JOHN B. ALLEY has lately appealed from an order lately made by the Circuit Court of the United States for the Southern District of New York, in favor of you, the said Eliphalet Nott, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the City of Washington, within thirty days after the date hereof, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New York, in the Southern District of New York, in the Second Circuit, the 28th day of December, 1883.
ADDISON BROWN.

(Indorsed): United States Circuit Court—Southern District of New York. Eliphalet Nott, &c., against Henry Clews and John B. Alley, et al. Citation on appeal. Abbott Bros., solrs. for appellant. Service of the within citation is admitted this 28th day of December, 1883.
HORATIO F. AVERILL,
Atty. for Plaintiff.

U. S. Circuit Court. Filed Dec. 29, 1883.
TIMOTHY GRIFFITH,
Clerk.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK, *ss.:*

I, TIMOTHY GRIFFITH, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify, that the foregoing pages, numbered from one to fifty-three inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Eliphalet Nott, &c., plaintiff, against Henry Clews, John B. Alley and others, defendants, as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eleventh day of January, in the year of our Lord, one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and eighth.

[SEAL.]

TIMOTHY GRIFFITH,
Clerk.

111-472

BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

No. —.

JOHN B. ALLEY, APPELLANT,

vs.

ELEPHALET NOTT, APPELLEE.

ALBERT A. ABBOTT,

Counsel for JOHN B. ALLEY, *Appellant*,

No. 71 BROADWAY,

N. Y. CITY.

Supreme Court of the United States, No.

JOHN B. ALLEY,
Appellant,
vs.
ELIPHALET NOTT,
Appellee, etc.

BRIEF FOR APPELLANT.

I. This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York, made and entered on the 21st day of December, 1883, remanding the action in which this appeal is taken to the Supreme Court of the State of New York. The order appealed from will be found upon page 49 of the transcript of record.

NATURE OF THE CASE.

II. It appears by the complaint, which will be found on pages 1 to 5 of the record, that this action was brought in the Supreme Court, County of New York, by Eliphalet Nott, against Henry Clews, John B. Alley, A. B. Meeker, Lee R. Shryock, Henry H Honore, Abia A. Selover, Frederick D. Grant and the Las Nueve Minas de Santa Maria Gold and Silver Mining Company. The complaint alleges that the action is brought, not only on behalf of the plaintiff, but as well for all other stockholders of the defendant mining company who may choose to come in and avail themselves of the benefits of this action, and pay their proportion of the expenses thereof. The complaint then proceeds to allege, substantially, as follows: that the plaintiff is a stockholder of the defendant mining company, and that he purchased his stock in good faith, and for a valuable consideration; that the defendant mining company is a corporation duly created and organized in October, 1881, under and by virtue of the General Laws of the State of New York; that the individual defendants above named were the trustees of said defendant mining company for the first year after the organization of said company, and at the time of the disposition and issue of its stock, afterwards mentioned in the complaint; that soon after the organization of the defendant company the individual defendants assuming to act for the defendant corporation entered into an agreement with the owner of certain mining claims and property, to issue to him, or to a trustee for him or to him and his associates, as full paid stock, nine hundred and ninety-nine thousand, nine hundred and ninety-three shares of the capital stock of said defendant corporation, amounting to twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars (being all the capital stock of said company except seven shares, which were issued for cash), for the consideration of the conveyance to said defendant corporation of said mining claims and property, which were conveyed in form, and said stock issued accordingly; that said mining claims and property were of little or no value in their then condition, and that

their actual value did not exceed, at any rate, five hundred thousand dollars; that immediately after the issue of such stock as aforesaid, a large portion of the same was turned over by the vendor of said mining property to the individual defendants and their associates, friends and nominees, at a nominal price, which price was less than five per cent. of the par value of said stock; that this transfer of stock was made in pursuance of a scheme devised and agreement made between said vendor and the individual defendants, for the sale of the mining claims and property, and the issue of the stock of the defendant corporation; and that, thereafter, said stock, or the portion thereof turned over to the individual defendants, was disposed of or might have been disposed of in the market at a large profit; that the individual defendants at the time of the issue of said stock and the conveyance of said property knew, or could and would, with the exercise of due and reasonable care and diligence, have known the condition and value of said property so conveyed to the defendant corporation; and that the market value thereof did not exceed five hundred thousand dollars; that the individual defendants, assuming to act on behalf of the defendant corporation, by the certificates of stock issued and circulated by them, represented to the public, including this plaintiff, that the said stock was full paid; that such stock or a large proportion thereof, including the stock now held by the plaintiff, has been sold as full paid stock in the open market, in pursuance of such representations, and has thus passed to innocent holders and purchasers, including the plaintiff; that plaintiff purchased his stock in the open market, relying upon the representations aforesaid, and thereupon received from the prior holder or holders thereof certificates, before that time duly issued under the sanction of said individual defendants, declaring such stock to be full paid, and accompanied by the usual power or powers of attorney for the transfer of the same; and that, thereafter, upon presentation of such certificates at the office of the company, the plaintiff received from the proper officer of the company new certificates running to himself for the like number of shares.

The plaintiff then alleges, as follows (See page 4 of record): "*Twelfth:* That the individual defendants have individually received "large sums of money, gains and profits from the sale of that portion "of the stock of the defendant corporation turned over to them at a "nominal price by the vendor of the property as hereinbefore stated. "That plaintiff is unable to state definitely the amount received by "said individual defendants and each of them from the sale of such "stock."

The complaint then proceeds to state that the individual defendants have not, nor have any or either of them accounted concerning, or paid over to the defendant corporation the difference between the twenty-four million, nine hundred and ninety-nine thousand, eight hundred and twenty-five dollars, represented by the capital stock of the defendant corporation issued for the property as aforesaid, and the real value or market value of the property conveyed to the said corporation in exchange therefor, nor any part of such amount, "nor "have the individual defendants or either of them accounted for or paid

" over to said defendant corporation the sums of money, gains and " profits received by them, or either of them, from the sale of the stock " of the defendant corporation as hereinbefore stated." That four of the individual defendants are still directors of the defendant mining company, and are a majority of the board of directors, and control the same, for which reason the defendant mining company is in no condition to bring and prosecute an action for the relief sought by this action; and neglects to do so, and is for that reason made a defendant in this action, but no personal claim is made against the defendant mining company. The plaintiff, in his complaint, then prays that the individual defendants may be adjudged and declared to be trustees as to the twenty-five million dollars represented by the one million shares of the capital stock of the defendant corporation, and that they may collectively and severally be adjudged and decreed to account of and concerning such sum. That they may also be severally adjudged and decreed to account of and concerning the sums of money, gains and profits received by each from the sale of the stock of the defendant corporation, as aforesaid. That the value of the property conveyed to said defendant corporation, to be determined by the Court, be credited on such accounting as may be just. That the amount found due on such accounting may be brought into Court and paid to a special receiver to be appointed by this Court, and disposed of as the Court may direct, and that plaintiff and other stockholders of such corporation who may choose to come in and share the benefits and expenses of this action, may be paid their proportion of the amount found due on such accounting, etc.

Proceedings in the Case.

III. To this complaint the four defendants, Clews, Alley, Shryock, and Selover, served demurrers on the 29th of March, 1883, stating as ground of demurrer that the said complaint did not state facts sufficient to constitute a cause of action (Record, pages 5, 6, 7). On the 4th day of June, 1883, at a Special Term of the Supreme Court for the City and County of New York, the issue of law raised by the demurrers of said four defendants was heard, and the demurrers were overruled, and an order entered to that effect, and giving *leave to said defendants demurring within twenty days to withdraw said demurrers and answer the complaint upon payment of costs* (Record, page 7). On the 9th day of June, 1883, pursuant to the rules of practice in the State of New York, an interlocutory judgment was entered overruling said demurrers, and giving the like leave to withdraw the same and answer the complaint upon payment of costs (Record, pp. 8, 9).

By order of Court, and also by consent of parties, the time within which said defendants were permitted to withdraw their respective demurrers and answer the complaint was extended to a date later than August 1st, 1883 (Record, pp. 9–16).

On the 1st day of August, 1883, the said four defendants withdrew their respective demurrers, and paid to the plaintiff's attorney the costs awarded to the plaintiff by said interlocutory decree (see notice of withdrawal, Record, page 16, and receipt for costs, Record, p. 17). On the same first day of August, 1883, said four defendants served

their separate answers to the complaint, which will be found on pages 17–32 of Record.

These answers, while differing in some particulars, put in issue all of the allegations of the complaint which are material to the recovery of a judgment by the plaintiff: that is to say, if the denials and averments in these separate answers should be sustained upon a trial the plaintiff could not recover. On July 13th, 1883, the defendant, Frederick D. Grant, served a demurrer to the complaint (page 33).

On the second day of August, 1883 (the day after the service of the separate answers of said four defendants) the defendant, John B. Alley, presented to the Supreme Court of the State of New York, in the City and County of New York, where said action was pending, his petition for the removal of said action into the Circuit Court of the United States for the Southern District of New York, setting forth that he was at the time of the commencement of said action, and then was a citizen of the State of Massachusetts; and setting forth that there was in said action a controversy between citizens of different States, which could be fully determined as between them, to wit: between plaintiff, a citizen of New York, and the said Alley, a citizen of Massachusetts; and in all other respects said petition complied with the Act of Congress of March 3rd, 1875, providing for the removal of causes from a State Court to the Circuit Court of the United States (Record, pp. 34, 35 and 36).

With this petition said Alley presented to said Supreme Court a bond executed by himself, and sufficient surety for the removal of said action; and on the 2nd day day of August, 1883, said bond was accepted and approved by a Justice of said Supreme Court, and on the same day said Court made and entered an order that said bond and said petition be accepted, and that said suit be removed into the Circuit Court of the United States for the Southern District of New York, and that no further proceedings be had in said Supreme Court. On the 2nd day of August, 1883, a copy of the record in this action was duly filed in the office of the Clerk of the United States Circuit Court for the Southern District of New York (Record, p. 40). Thereafter, the plaintiff moved in said Circuit Court for an order dismissing all proceedings in this action, and remanding the same and the record therein to the Supreme Court of the State of New York (Record, p. 40). Upon that motion, it appeared that in the year 1883 there was no term of the Supreme Court for the City and County of New York for the trial or argument of demurrers or issues of law or of fact in the months of July, August or September (Record, page 43). The motion to remand the cause was granted, and an order to that effect made and entered on the 21st day of December, 1883.

The sole ground upon which the motion to remand was granted, as stated in the opinion of the Court, was that the hearing and decision of the demurrers of the four defendants was a trial of the cause within the meaning of the removal act, although the decision of the Court in overruling the demurrers provided that the demurrers might be withdrawn, and that the said four defendants might answer the complaint, and notwithstanding the fact that before the removal they availed themselves of such terms, and served their separate answers, raising

issues of fact which were not tried and could not have been tried at any time between the date of the service of said answers and the date of said removal (Record, p. 48).

From said order remanding the cause, the defendant Alley appeals to this Honorable Court, claiming that said order is erroneous, and, in particular, that the proceedings for the removal of this cause were taken and completed in time.

Brief Argument.

IV. *The removal was in time.*

The Act of Congress provides that the proceedings for the removal of a cause shall be taken "before or at the term at which said cause could "be first tried, and before the trial thereof." The precise question here presented is whether or not the argument of the demurrers to the complaint followed by a decision which permits the withdrawal of the demurrers, and grants leave to the defendants demurring to serve answers raising issues of fact, which answers are served, is a trial within the meaning of the Act of Congress. It must be conceded that the Code regulating the practice and procedure in the Courts of the State of New York defines the argument or hearing of a demurrer as the trial of an issue of law, but no statute law of any State can be invoked to define or put a limitation upon an Act of Congress when such definition or limitation is hostile to the plain intent and spirit of the Act, contrary to authorities of general application, and opposed to the interpretation of the same Act which has been adopted by the Courts of the United States.

Standard law writers have, we believe, uniformly defined the word "trial" as meaning *the investigation and decision of fact only.*

> Stephen on Pleading, page 77.
> Id. Note 29 Appendix, citing Bracton, 105 a., and Britton, c. 92.
> Blackstone's Commentaries, vol. 3, p. 330. Bouvier's Law Dictionary, vol. 2, p. 611, title "Trial."

In a case arising under the Code of Procedure of New York, the Supreme Court said: "The whole embarrassment in this case has been "created by adopting a new definition of the word 'trial,' in section "252. This word at the adoption of the Code, and for the two hun- "dred years previous, was understood to mean the examination "before a competent tribunal, according to the laws of the land, of "the facts put in issue, for the purpose of determining such issue." (Ward v. Davis, 6 Howard Practice, N. Y. 274.)

This Court has recognized and affirmed the correctness of this definition of the word "trial" in a removal case; we quote: "The act author- "izes the petition for removal to be filed 'at any time before the final "hearing or trial of the suit.' The hearing or trial, here referred to, "is the examination of the facts in issue." (Vannevar v. Bryant, 21 Wallace, 43.)

In construing this very act under consideration, Mr. Justice Woods, sitting at the Circuit, used the following language: "By the word

" 'trial,' as used in the statute, I do not understand the argument, in-
" vestigation or decision of a question of law, merely unless it is de-
" cisive of the cause and the question, and results in a final judgment or
" decree. The decision of the Court on a demurrer for instance, or on
" exceptions to the sufficiency of a plea which is followed by amend-
" ments or new pleadings, and which does not end the case, is not the
" trial meant by the statute."

(Lewis v. Smythe, 2 Woods, C. C. 177.)

Judge Dillon says that the motion is in time if made before or at the term at which the case could first be tried *upon its merits.*

(Dillon on Removal, etc., 2nd ed., p. 78.)

In the recent case of Miller agst. Tobin, Judge Deady decided the precise point in question. In that case (as in the present), the application for the removal of the cause was made after the hearing of the demurrer to the complaint and the order overruling the same, which was, as here, accompanied by leave to the defendant to answer or plead to the merits. The plaintiff objected that the removal was too late because made after trial Upon this point the Court uses this language: * * "If upon the hearing of the demurrer, the same is
" overruled, but, instead of the Courts giving judgment upon the com-
" plaint for the plaintiff, it makes an order allowing the defendants to
" answer or plead to the merits, I do not think there has been a 'trial' of
" the cause within the meaning of the act, so as to preclude the right
" of either party to apply for the removal of the same. The trial con-
" templated by the act is a final one, in which the cause as far as the
" judgment of the State Court is concerned is ended. * * 'Trial'
" is a common law term, and is commonly used to denote that step in
" an action by which issues or questions of fact are decided. It was
" also formerly applied to the hearing on a demurrer as the trial of
" an issue of law. * * The act of 1875 simply uses the word
" 'Trial'—providing that the petition for the removal of cause shall
" be filed 'before the trial thereof,' whether it is an action at law or a
" suit in equity—and should be construed as only applicable to that
" step or proceeding in the progress of the case which results in a
" final disposition of it. And so, in my judgment, when a cause is sub-
" mitted to a jury and no verdict is given, or the one given is set
" aside, or when a cause is heard upon a demurrer, and no final judg-
" ment or decree is given thereon, but leave is given to amend or
" answer over, as the case may be, there is no 'trial' within the
" meaning of the act, and therefore, at any time, before a trial of an
" issue of fact or law which results in a final disposition of the case,
" and during the term at which such trial may be had, a party en-
" titled to remove the same may file his petition and bond therefor
" with effect."

Miller v. Tobin 18, Federal Reporter, p. 609.

It is impossible to distinguish the present case from that of Hewitt vs. Phelps, decided by this Court, and reported, 105 U. S., 393. That was a bill in equity in the Chancery Court in Mississippi. The case

was put at issue by answer, and "the bill was, for want of equity, dis-
"missed on final hearing." The plaintiff appealed from the decree, and by this appeal the cause was removed into the Supreme Court of that State, which Court thereafter reversed the decree of the Court below, and remanded the cause to the Court of Chancery, "with leave "to both parties to amend pleadings as they may be advised, and to "take testimony, and for an account to be taken in accordance with "the views contained in the opinion." This mandate of the Supreme Court was filed in the Chancery Court, and on the same day the defendants presented their petition for removal of the cause to the Circuit Court of the United States, and, after the removal, availed themselves of the leave granted by the Supreme Court, and filed new and amended pleadings. The appellants in this Court contended that the application for removal came too late, but in overruling this objection, the Court, by Mr. Justice Matthews say: "But here, although the "Supreme Court of Mississippi passed in its opinion upon the merits "of the case, as disclosed by the record then before it, it nevertheless, "in remanding the cause 'with leave to both parties to amend plead-"ings as they may be advised and to take testimony,' the whole mat-"ter was open and at large, as though the cause had never been at "issue. * * It was not a judgment which operated as an estoppel "between the parties. It was neither final nor conclusive. In point "of fact, after the removal of the cause into the Circuit Court, the "parties availed themselves of the leave granted, and filed new and "amended pleadings. The cause then stood in that Court just as it "would have stood in the State Court but for the removal, *i. e.*, for a "rehearing upon the merits and not for the purpose of merely exe-"cuting the judgment of the Appellate Court, as in the case of Duncan "v. Gegan, 101 U. S., 810. Being properly removed the parties are "subject to that administration of law which is approved in the "judicial tribunals of the United States, whose jurisdiction is thus "invoked, as was held in King v. Worthington, 104 id., 44."

The case last cited is also decisive of the question here presented. That was a suit in equity brought in the Superior Court in Illinois. Issue was joined by answer, and upon "final hearing" a decree was made in favor of the complainants. The defendants appealed to the Supreme Court of the State, and the decree was reversed because of the improper admission of certain testimony against the objection of defendants.

The decree of the Supreme Court remanding the cause was made October 11th, 1875, and its mandate was filed in the Superior Court November 11th, 1875, in November term. On the last day of said November term, the complainants filed their bond and petition for removal. On appeal to this Court from the decree against them in the Circuit Court, the defendants objected that the cause was not removable under the Act of Congress, in that the petition was not filed at the term at which said cause could first be tried or before the trial thereof; but the Court in overruling this objection say: "If the de-"cision of the Supreme Court had finally disposed of the case there "could, of course, have been no removal of the cause to the Federal "Court after such decision. But according to the practice and juris-

" prudence of the State of Illinois, where the decision of the Supreme " Court reversing and remanding a cause in equity does not involve " the merits, the case upon the filing of the transcript in the Court " below stands for rehearing in that Court."

It is stated in the opinion of Judge Wallace, remanding this cause to the State Court, that the precise question here presented " has " been decided adversely to the defendant by Judge Benedict in " Langdon vs. Fiske, and it was there held that such a hearing was a " trial which precluded a subsequent removal of the suit." Evidently Judge Wallace was misinformed concerning the decision actually made by Judge Benedict in the case referred to. The record in that case discloses the following facts, viz.: The action was in all respects similar to the present action excepting as to names of parties, and the mining company whose stock was alleged to have been wrongfully issued. The form of the complaint was the same as was used in this action. The defendant Fiske demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. That demurrer was noticed for argument at a regular term of the State Court, and when called for argument was adjourned until the next succeeding term. Immediately thereafter, and after the end of the term for which the cause had first been noticed, the defendant filed his petition for removal. At that time the demurrer had not been disposed of, and it remained uncertain whether the decision of the Court upon the demurrer would or would not result in a final disposition of the case. It would be in the discretion of the State Court upon the hearing of the demurrer to grant or refuse to grant leave to either party to amend their respective pleadings or to plead anew. In defense of Judge Benedict's decision it may be said that, in the absence of any special circumstances tending to influence the discretion of the Court, the presumption would be that the decision upon the demurrer would be final. We think, however, that considering the almost invariable practice of permitting amendments or new pleadings after demurrer, that the presumption would be to the contrary; but, while we do not subscribe to the correctness of Judge Benedict's decision upon the facts presented in the case of Langdon agst. Fiske, it is perfectly obvious that that decision is not decisive of the present case, nor at all pertinent to it.

It is further stated in the opinion of Judge Wallace that " Babbitt " vs. Clark, 103 U. S., is authority for the proposition that a trial of a " cause upon an issue of law is a trial which will preclude the removal " of the suit afterwards." We are unable to find anything whatever in the report of this case which warrants such statement.

In concluding our remarks under this head, we respectfully submit that it is clear, both upon principle and authority, that the petition of the appellant for the removal of this cause was presented in time. It was presented the very day after service of the appellant's verified answer, which denied every allegation of the complaint necessary to be proved by the plaintiff in order to entitle him to recover. It disclosed meritorious defenses never submitted to any Court, and the opportunity of submitting which had never been presented prior to the removal. It would be a grossly unjust and narrow construction

of the removal act. which should deprive the appellant of the benefits intended to be conferred by the act, and subject him—a citizen of Massachusetts—to the laws and rules of decisions prevailing in the Courts of the State of New York, especially when such decisions have been (certainly in this case on the decision of the demurrer) in direct hostility to the rules and decisions of the Supreme Court of the United States.

(See 94th Equity Rule, and Hawes against Oakland, 104, U. S. Reports, 450).

The only ground upon which the decision of the Court below remanding this cause was placed was that the removal was not in time, and, as we have seen, this should be overruled. The counsel for appelee contends, however, that the cause was not of such a character as to have been removable, *at any time*, upon the petition of Mr. Alley, in that there was no separate controversy in the action between himself and plaintiff which could as between them be determined, without the presence of any of the other parties.

The Act of Congress, March 3, 1875, Section 2, provides for the removal of any suit from a State Court to the Circuit Court of the United States, where the matter in dispute exceeds, exclusive of costs, five hundred dollars, *in which there shall be a controversy between citizens of different States;* and further provides as follows, that "when " in any suit mentioned in this section there shall be a controversy " which is wholly between citizens of different States, and which can " be fully determined as between them, then either one or more of " the plaintiffs or defendants actually interested in such controversy " may remove said suit into the Circuit Court of the United States " for the proper district."

It will be observed, and, indeed, this Court has already pointed it out, that Congress did not in this act refer to the *cause of action*, but to any *controversy* in the action. Therefore, if a controversy can be discovered between the plaintiff Nott and the defendant Alley, raised by the allegations of the complaint and the denials of the answer, which controversy can, as between them, be fully determined without the presence of any of the other parties, the cause was one for removal.

Unquestionably such a controvery is presented by the pleadings.

The complaint, after alleging what is claimed to have been a wrongful and fraudulent issue of the stock of the mining company to an amount many times greater than the value of the property for which it was issued, alleges, at page 3 of the Record, that immediately after such issue said stock was turned over to and received by the *individual defendants*, at a nominal price, which was less than five per cent. of the par value of said stock; and at page 4, paragraph twelfth of the complaint, it is alleged that the *individual* defendants have *individually* received large sums of money, gains and profits from the sale of that portion of the stock of the defendant corporation so turned over to them, and that the *individual* defendants have not, nor have any or either of them accounted of or concerning, or paid over to the defendant corporation the sums of money, gains and profits received by them, or either of them, from the sale of the stock of the

defendant corporation. On page 5 of the Record, the plaintiff prays for a *several judgment against each of the individual defendants*, viz., "That they may also be *severally* adjudged and decreed to account of "and concerning sums of money, gains and profits *received by each* "from the sale of the stock of the defendant corporation as afore-"said."

All of these allegations are denied by the answer of Mr. Alley, the present appellant, and it is clear to a demonstration that here is a separate controversy to be determined between him and the plaintiff as to whether he has individually received stock or proceeds of stock which he and he alone is legally bound to restore at the present suit of this plaintiff. No other party need have been sued or brought in to the action to determine whether or not the defendant Alley is liable for this cause.

But beyond this, if there is any cause of action whatever alleged in the complaint, it is one arising in *tort* for the wrongful conduct of the individual defendants in dealing with the stock of the defendant mining company.

The liability of all of the defendants in such an action is both joint and several. If *several* the controversy presented is also *separate*, as between the plaintiff and each one of the defendants.

The plaintiff, at his election in such an action, has the right to determine whether he will sue all or one or more than one of the defendants. He may (as he has done in this case) name them all and serve less than all; he may name a part only or one only. He may recover against one only, and discontinue as to the remainder.

But the plaintiff's right of election to determine for himself how many of the *tort feasors* he will join as defendants, does not make the controversy any less a separate one as between him and each of them, and no exercise of such right of election can deprive any one of the defendants who may be a citizen of another State of his clear right under the removal act to have his cause tried in a Federal Court.

This position is clearly and forcibly upheld in the case of Kerling v. Cotzhausen 16, Fed. Reporter 705, which was decided by the Circuit Court for the Northern District of Illinois, by Judges Drummond, Harlan and Blodgett.

Clark vs. Chicago, M. & St. P. R'y Co., 11 Fed. Rep., 355, is also directly in point. See opinion at page 358, as follows:

"The plaintiff brought his action against both the resident and "non-resident defendants, sounding in tort.

"Each defendant was liable as a wrongdoer if the plaintiff proved "his case, and the controversy was severable. The plaintiff could "have sued either without the other being a necessary party; or, as "he did, sue both as joint wrongdoers. This is a legal privilege the "plaintiff could exercise, but he cannot by joining in the suit the "non-resident defendant debar him from asserting a right given by "the Act of 1875."

REVIEW OF AUTHORITIES CITED IN BRIEF OF COUNSEL FOR APPELLEE.

By stipulation of counsel, the drafts of their respective briefs on

this appeal were interchanged on March 10, and by the same consent both sides had the right to reply.

The authorities cited by counsel for appellee have been examined, and such comments thereon as are considered necessary or appropriate are made below.

Neudecker vs. Rosenbaum, 19 Blatch., 35.

This cause was at issue by answer in March, 1872, and was triable at any time thereafter by a jury. The Removal Act was passed March 3, 1875.

The cause was tried in June, 1878, and the plaintiff had judgment, afterwards affirmed by General Term, but later reversed by Court of Appeals, and a new trial ordered.

On June 11, 1880, the State Court, by order, made the judgment of the Court of Appeals its judgment, and the cause then stood in readiness for a new trial. Proceedings to remove were not taken until December, 1880. The cause had once been tried *on the merits*, and there were several opportunities for the second trial before the attempted removal.

The case is not pertinent.

Cramer vs. Mack, 12 Fed. R., 803.

In this case an issue of fact had been joined, and that issue had been noticed for trial, and the cause had been placed upon the calendar for trial for the January term.

Afterwards the defendant served an amended answer, and after the end of the January term defendant presented his petition for removal. Judge Wallace held that he was too late. Without expressing our dissent from this decision, it is sufficient to say that the cases are not analagous.

Milton vs. Kent, 60 How. Pr. R., 451, was a decision of a single Judge sitting at Chambers of a State Court. His remarks as to what constitutes a trial within the meaning of the Removal Act are stripped of all force when it is observed, at p. 455 of the Report, that *the cause was at issue by answer more than a year before the removal proceedings, and might have been tried more than a year before upon such issue.*

The reported case showed that most flagrant abuses had been practiced by defendant by the interposition of three demurrers and several answers, and the decision is of no authority or value in this case.

Bright vs. Milwaukee, &c., R. R. Co., 1 Abb. N. C., 14.

In this case a demurrer having been interposed by certain of the defendants it was sustained. *No leave was granted to plaintiff to plead anew or amend his complaint.* "After several years' delay, "plaintiff moved for leave to discontinue, and the leave being "granted, only on condition of paying costs, he moved to transfer the "cause into the United States Circuit Court, under the Act of 1875."

The Judge rightly held that he was too late. The cause had been

tried and disposed of finally. The remarks in the opinion as to what constitutes a trial were unnecessary and ill considered.

Moulton vs. Beecher, 1 Abb. N. C., 193.

The Court in New York, construing the N. Y. Code of Procedure, simply held that defendant was entitled to an extra allowance by way of costs upon a final recovery after demurrer.

Connell vs. Utica, &c., Co., 13 Fed. Rep., 241.

The Report does not give the facts of the case, and the opinion is brief, but states that the suit was not removable under the second clause of Section 2 of the Act of March 3, 1875, " because there was " not in the suit a separate controversy wholly between citizens of " different States," and this is the ground of the decision to remand.

The subsequent statement in the opinion that the decision of the State Court, in that particular case, was a proper one to be followed, cannot be reasonably supposed to mean that the Federal Courts in all such cases ought properly to abide the decision of the State Courts. Such a proposition would lead to an obvious absurdity.

Removal Causes, 100 U. S., 473.

In so far as these cases are at all pertinent, they support the contention of the appellant.

It appears that when the cause was called for hearing a motion was made to substitute one Meyer as a party defendant, and this motion being denied, the petition for removal was presented, but it was denied by the State Court, on the ground that it was presented too late. The plaintiff had judgment, and on error to this Court it was held as follows (pp. 472, 473, 474): " We think also the application " was made in time * * *."

It is evident that at that time (when the application for removal was made) the cause was not up for hearing on its merits * * * as in the case of Yulee vs. Vose (99 U. S., 539), ' the most that can ' be said is that preparations were being made for trial.' "

The cases said to have been decided by Judges Barnard, Cullen, Freedman and O'Gorman do not appear to have been reported, and we are unable to review them, nor is it important to do so, since the Federal Courts are the proper tribunals to construe Acts of Congress.

Petterson vs. Chapman, 13 Blatch., 395, was decided about a year after the passage of the Act of 1875, and cannot be regarded as authority. Both points of decision have been overruled by numerous cases, to wit: that the only *party* who can remove a cause is the aggregate (however numerous) of all the parties, either plaintiff or defendant; and secondly, that an action of tort, where several tort feasors are sued, cannot be wholly determined as to any one of them, without the presence of the other.

The case is neither sound in principle nor sustained by the weight of later decisions.

Sawyer & al vs. Switzerland Marine Ins. Co., 14 Blatch., 451.

This was an action brought by plaintiffs, as copartners, to recover a debt due the partnership. Defendant Company was created by the Republic of Switzerland; two of the plaintiffs were aliens, and the other partner-plaintiff a citizen of New York.

After removal the cause was remanded, and properly so.

Van Brunt v. Corbin, 14 Blatch., 496.

This cause was remanded by Judge Benedict solely upon the authority of Petterson v. Chapman, which was decided by the Circuit Judge of his District. He concedes that this is opposed to the decision of Mr. Justice Bradley, in Girardy vs. Moore, 5 Central Law Journal, 78, and appears to acquiesce with reluctance to the views of Judge Johnson in Petterson vs. Chapman, which this Court has since overruled.

Clark vs. Opdyke, 10 Hun., 383.

In this case the plaintiff did not charge the defendant, on whose petition the cause was removed, with any individual act not common to the other defendants, nor did he seek to obtain as to him any accounting of moneys received by him individually, nor any judgment therefor.

Fraser vs. Jennison, 106 U. S., 194.

There is nothing in this case to which we do not agree. The plaintiffs were heirs-at-law of one Fraser, deceased, and brought suit to contest the latters will. Two of the heirs were non-residents of the State.

It was held that there was no separate controversy between them and the defendants.

Tuedt vs. Carson, 13 Fed. Rep., 353.

The decision remanding this case turned solely upon the point that the non-resident defendants upon whose petition the suit had been removed were not "*actually interested*" in the controversy within the meaning of the Act, because it transpired that as against them there was no cause of action, and so soon as this was discovered plaintiff moved to remand the cause.

It was rightly held that this motion should have been granted.

Merchants' Bank vs. Thompson, 4 Fed. Rep., 876.

This was a suit to foreclose the equity of redemption of defendant in five shares of certain lands, held by plaintiff as collateral security for the payment of defendants' bond for $20,000. It appeared by defendant Thompson's answer that one of these five shares had been transferred by him to one Clarke, a citizen of Massachusetts. Clarke having been brought in as a party defendant, Thompson applied to remove the cause on the ground that he was a citizen of another State, and that there was a separate controversy as to him.

The cause was remanded.

It was an action sounding in contract; and there was but one contract.

Vose v. Yulee, 64 N. Y., 450.

The decision of the Court of Appeals in this case is cited as authority for the contention of the appellee.

Doubtless it has escaped the attention of the learned counsel for the appellee that *this decision of the Court of Appeals was distinctly overruled and reversed by this Court on error.*

Yulee vs. Vose, 99 U. S., 539.

Particular attention is called to the above decisions, and it will of course be conceded that since this Court has held the exact reverse of the proposition of the appellee his mouth is effectually closed.

Cook vs. State Nat. Bank, 52 N. Y., 113.

This case is cited as authority for the proposition that the word controversy should be held co-extensive with the whole issue. The claim is absurd in principle, and has been repeatedly rejected by this Court.

Babbitt vs. Clark, 103 U. S., 606.

In this case it appears distinctly that the cause was at issue *by answer* of defendant and "in a condition for trial, and actually tria-"ble two months before the January term closed" (see report of opinion, p. 612).

The January term ended on April 7th, and the petition for removal was not filed until May 17th.

The decision bears no analogy to the present case.

With great respect for the learned counsel for the appellee, we venture to appropriate his own form of submission, and to say that all of the decisions cited by him and not herein reviewed, as well as those which are reviewed, "group themselves around two princi-"ples," viz:

First.—They are not pertinent to the questions presented by this appeal, or

Second.—They have been overruled by later and controlling authorities.

In conclusion, it is respectfully submitted that the order of the Circuit Court of the United States for the Southern District of New York, remanding this cause to the Supreme Court of the State of New York, should be reversed, and the cause should be remanded to said Circuit Court of the United States, with directions to proceed therewith.

ALBERT A. ABBOTT,

Counsel for JOHN B. ALLEY,

Appellant.

111-472

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CLERK.

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

U. S. Supreme Court.

JOHN B. ALLEY,
Appellant,

AGAINST

ELIPHALET NOTT, &c.,
Appellee.

This motion was made to remand to the State Court the above action, in which an attempt has been made by the appellant John B. Alley to remove it to the United States Court under the Act of 1875, §§ 2 and 3.

Demurrers were interposed in the State Court to the complaint by the defendants Alley, Clews, Selover and Shryock before April 4th, and the same were duly argued June 4th, 1883, at the June Term of the Supreme Court, held by Judge DONOHUE, and were overruled by him (p. 7), and on the 9th of June, 1873, judgment was entered for the plaintiff (pp. 8–9), permission being therein given to the defendants to answer on payment of costs. The defendants on the 18th of June, 1883, appealed to the General Term of the New York Supreme Court, and on the 23d of June served notice of motion for July 2 for a stay of proceedings pending the appeal, which motion was argued July 12th and denied August 9th, 1883. Pending the decision of that mo-

tion, and on August 1st the said defendants withdrew their appeal and demurrers, and served separate answers paying the costs, and on August 2d the defendant Alley presented his petition and bond and obtained an order of removal of the case to the U. S. Court.

August 15th the plaintiff obtained an order to show cause returnable on the 20th before Judge DONOHUE why the order of removal should not be vacated, and on argument Judge DONOHUE declined to entertain the motion without examining its merits, on the sole ground that he considered the United States Court the proper place to make the application.

The defendant Grant served a demurrer dated July 13th, 1883.

The motion was based upon two grounds:

(1) That the petition for removal was not filed in time as the cause had been tried, and the Circuit Court sustained the motion on this ground (p. 48).

(2) That there was not a controversy which could be fully determined between the plaintiff and Alley, the non-resident defendant, but the Circuit Court overruled this ground (p. 47).

And the defendant appeals from the order remanding the cause.

First Point.

The application to remove this cause was not made in time.

Babbitt vs. Clark, 103 U. S., 606, seems decisive of this case, holding that in general a trial of an issue of law is a trial (p. 612), and specifically that if the laws of the State where it was tried recognize

it as a "trial," this Court will so regard it (concluding paragraph of opinion).

The Act of 1875, § 3, requires that the petition be filed "before or at the term at which said cause could be first tried, and *before the trial thereof.*"

Neudecker vs. Rosenbaum, 19 Blatchf., 35:

"The trial means the first trial" (p. 36).

Cramer vs. Mack, 20 Blatchf., 481: "When there is an issue which by the practice of the Court can be brought to trial the cause is triable;" and "serving an amended answer will not enlarge his time for removal."

The demurrer has been tried and judgment entered upon that trial, and therefore there has been the trial of an issue of law.

This point has been expressly decided by Judge BENEDICT in Langdon vs. Fisk, October 31, 1883. Whatever may have been the old common law definition, it is now settled in New York that a trial of an issue of law is a *trial.*"

The Code, § 965, provides that "An issue either of *law* or of fact must be *tried* as prescribed in this chapter, &c., &c." § 964, "An issue of law arises only upon a demurrer."

§ 969, "An issue of law * * * must be *tried* by the Court."

The Old Code, § 252, gave a definition of "a trial" as "the judicial examination of the issues between the parties, whether they be issues of law or of fact." § 965 of the New Code is substituted for that section, and is equivalent to it (see Mr. Throop's note to this section 965 in his edition of the Code).

§ 1021, "The decision of the Court, or the report of a referee, *upon the trial of a demurrer*, must direct the final or *interlocutory* judgment to be entered thereupon."

§ 990, "An *issue of law* may be *tried* in any county * * * but after the *trial* * * *"

§ 3251, "For the *trial* of an issue of *law*, twenty dollars."

This precise point has been decided in Miller vs. Kent, 60 How. Pr. R., 451, in which an application to remove was made after demurrers had been decided. The Court say (p. 456): "The motion to remove this action to the U. S. Court should be denied. * * * It is too late, because the issues not only could, but actually have been tried. There is no limitation in the statute to issues of fact. There were here several trials of issues of law, and final judgment might have been rendered thereon. Leave to answer, even though usual, is in theory, of discretion. Congress did not intend to permit a removal after such experiments in the State Courts."

And in Bright vs. The Milwaukee R. R. Co., 1 Abb. New Cases, 14, the Court holds the same doctrine, "that after a default taken upon a demurrer it is too late to remove the case to the U. S. Courts."

And in Moulton vs. Beecher, 1 Abb. N. C., 193, "the argument of an unsuccessful demurrer is a *trial*."

It seems, therefore, perfectly well established in New York, according to its Code and its judicial decisions, that there has been a trial in this cause, and this appears to be conceded by the appellant's counsel in his brief (Point IV.).

Judge BLATCHFORD in Connell vs. Utica & E. R. R. Co., 13 Fed. Rep., 241, lays down the rule, that the decisions of the State Courts as to pleadings should be followed by the U. S. Courts in removal cases.

In Removal Cases, 100 U. S., 473, the Court say: "We think it clear that Congress did not intend by the expression 'before trial' to allow a party to experiment in the State Court, and, if met with un-

expected difficulties, stop procedings and take his suit to another tribunal."

The appellant cites as sustaining his position, Lewis vs. Smythe, 2 Woods, 117. But the remark of the Court in that case to the effect "that the trial of a demurrer is not such a trial as the Act of 1875 contemplates," is mere "*obiter dictum*," as will appear from two considerations:

(1) There had not been any demurrer in the case. There had been a commencement of a hearing upon pleadings and proofs when the defendant presented his petition and filed his bond.

(2) The State Court held this was too late and the U. S. Court held *the same*, and remanded the cause. It did not, therefore, even decide that the application was in time; "*a fortiori*," it did *not* decide that it was in time, because only an issue at law had been tried. It merely stated what it thought it would do in a case that was not before it, and which it did not do.

The appellant also cites Miller vs. Tobin, 18 Fed. Rep., 615. But the point was evidently but little discussed or considered in that case, not having been stated as a ground of the motion.

The case of Babbitt vs. Clark, 103 U. S., 606, is not even referred to by Judge DEADY. And if the utmost weight is given to Judge DEADY's decision, it is outweighed by the joint decision of Judges WALLACE and BROWN, in the present case, and that of Judge BENEDICT, in Langdon vs. Fisk.

In Hewitt vs. Phelps, 105 U. S., 395 (cited in the opinion of Judge DEADY, and relied upon by the appellant), the contention was whether it was "pending" when the Act of 1875 was passed, and this Court held that it was, and distinguished it from Jifkins vs. Sweetzer and other preceding cases, which it held had been, before removal, finally dis-

posed of, leaving nothing to be done but the settling of details.

Hewitt vs. Phelps being "pending" at the time of the passage of the act, it was decided to be removable the next term "thereafter" at which it could be tried; and it falls thus within the principles settled in Hoadley vs. San Francisco, 94 U. S., 4, and Meyer vs. Del. R. C. Co., 100 U. S., 457, but decides no new principle.

The question raised in the present case is entirely different, as this case was brought after the passage of the act.

And that case did not decide that in every case an amendment of the pleadings takes it out of the limitation of the statute, nor has any such construction ever been favored by the courts.

20 Blatchf., 481.

The argument of the appellant on this branch of the case would lead to the anomalous conclusion that, when a demurrer is ready for trial at a term, and is passed, it is too late for the removal of the case, but, if it is actually tried at that term, then it can be removed.

The permission to answer over is a mere favor granted to the defendant. But, even when after a trial a new trial is granted by the Court, it is too late to remove.

Gaffney vs. Gillette, 4 Dill., 264.
Crane vs. Reeder, 35 Mich., 146.
Young vs. Andes Ins. Co., 3 Cent. Law J., 719.
Chandler vs. Coe, 56 N. H., 184.

And it is too late after a trial where the jury have disagreed.

Bible Society vs. Grove, 101 U. S., 610.

Second Point.

The appellant Alley cannot contend that the case was not ready for trial, on the ground that his co-defendant Grant had not yet demurred.

N. Y. Code, § 967.

(1) "One of two defendants appearing by a "separate attorney, and having a separate and "different defense, may bring the cause as to him-"self to trial."

Gurnee vs. Hoxie *et al.*, 29 Barb., 547.

The above is the very language of the head-note of that case, decided by the General Term of the First Department.

The appellant Alley contends that his defense is "separate and different;" he must do so or he fails to show a ground of removal.

(2) After the appellant Alley has actually tried his issue of law, he is estopped from contending that it could not be tried.

The answer is, it has been tried.

The Court will not permit him to make that experiment, and then to seek to stultify himself in this manner.

Fry vs. Bennett, 9 Abb. Pr. R., 45–50.
Warner vs. Wigers, 2 Sandf., 635.

Third Point.

The opinion of the Court below (p. 48) is especially called to the attention of this Court on this branch of the case.

Fourth Point.

The appellee contends as a second ground for remanding this cause, that it could not be removed from the State Court unless there was a separate controversy between the plaintiff and John B. Alley, the non-resident defendant.

U. S. Act of 1875, Chap. 137, § 2.

"And when in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different States, and which can be *fully* determined as between them."

Hyde vs. Ruble, 104 U. S., 409.
Winchester vs. Loud, 2 Supreme Ct. Reporter, 311, to be reported in 108 U. S.
Connell vs. Utica, N. & E. R. Co., 13 Fed. Rep., 241.

The petition and record must show jurisdictional facts sufficient to bring the case within the act of 1875. It is not sufficient that the petition aver in general terms that "the controversy is separate."

Trafton vs. Nongnes, 4 Sawyer, 183.
Amory vs. Amory, 95 U. S., 183.
Ins. Co. vs. Pechner, 95 U. S., 180.
Bible Society vs. Grove, 101 U. S., 610.
Winchester vs. Loud, 2 Sup. Ct. Reporter, 311, to be reported in 108 U. S.
Lalor vs. Dunning, 56 How. Pr. R., 209.

Fifth Point.

In this action there is no separate controversy between the plaintiff and John B. Alley, the non-resi-

dent defendant, and the cause therefore was non-susceptible of removal from the State Court.

The action is joint against all the defendants.

The complaint (pp. 1-5) charges that the defendants were trustees of Las Nueve Minas de Santa Maria Gold and Silver Mining Company, a corporation duly incorporated under the laws of New York, with a capital stock of $25,000,000, and that said defendants, assuming to act for said corporation, entered into an agreement with the owner of certain mining property in Mexico, to issue to him as full paid stock, 999,993 shares of said stock, amounting to $24,999,825, for the conveyance to said corporation of said mining property. That said property had been recently purchased for $17,000, and was not worth $500,000, and that $24,999,825 was an unfair, excessive and improvident consideration for the conveyance of said property (4th clause), all which was well known to defendants, or could have been by the exercise of due and reasonable care and diligence on their part. That immediately after the issue of said stock a large portion of it was turned over by the vendor of the property to the defendants and their nominees at a nominal price, less than 5% of its par value, and that such transfer was in pursuance of the real scheme devised and agreement made between the vendor and the defendants for the sale of said property (6th clause), and that the portion of stock turned over to defendants was, or might have been disposed of in the market at a large profit. That defendants neglected to file the certificate of amount of capital required by law; that said corporation after the disposition of said stock was without means to work said property, and the defendants created a debt of $90,000 in ostensible efforts to work the mines. That the defendants by certificates represented the stock as full paid, and that plaintiff is an innocent holder thereof, having

purchased it in open market. That the individual defendants have individually received large gains and profits from the sale of the stock turned over to them by the vendor; but that plaintiff is unable to state definitely the amount received by each defendant. That the defendants have not paid over or accounted for the difference between the value of said property and the amount represented by the capital stock issued for said property, nor the gains or profits above mentioned. That four of the defendants are still directors of the company and a majority of its board and control the same, so that the corporation is in no condition to bring this action (14th clause), and the prayer is (pp. 4 and 5) that the defendants may be adjudged to be trustees as to the $25,000,000 represented by the 1,000,000 shares of capital stock, and collectively and severally to account concerning said sum, and severally to account concerning the gains and profits received by each from this sale of stock; and that the value of the property be credited on such accounting, and that the amount due on such accounting be brought into Court and disposed of as the Court may direct.

The case of Winchester vs. Loud, 2 Supreme Court Reporter [illegible] to be reported in 108 U. S., seems in close analogy to the case at bar, and decisive as to the propriety of remanding the cause. The bill in that case was to establish a trust against three defendants to obtain the removal of *two* and an accounting. As to the two trustees sought to be removed, the questions were far more separable and separate than in the present case, yet the Court held that the "controversy" was but "single," "although it involved the determination of several questions," and remanded the cause to the State Court.

In Cooke vs. State National Bank of Boston, 52 N. Y., 113, the Court of Appeals hold that in re-

moval cases, "the word 'controversy' should be held coextensive with the *whole* issue."

Even the defendant Alley must admit that the principal matters at issue affect all the defendants jointly, such as that defendants joined in a scheme to defraud the corporation, receiving stock in pursuance of it, and that while directors, they divided stock among the stockholders in violation of the statute, and thus "all the defendants are directly interested in the relief that is asked" within the language of Winchester vs. Loud.

In Hyde vs. Ruble, 104 U. S., 409, the Supreme Court decided that in an action on a contract against two persons alleged to be partners, where one defendant denies partnership and alleges full performance of the contract, and the other denies partnership or making any contract, "The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy."

And in Gudger vs. Western N. C. R. R. Co., The Reporter, Vol. 16, p. 312 (Sept. 5, 1883), the Supreme Court of North Carolina construes the decision of the U. S. Supreme Court in Hyde vs. Ruble to apply to a tort as well as a contract.

In Fraser vs. Jennison, 106 U. S., 194, it is held that although the probate of a will is contested on the grounds that the testator was not of sound mind, that he did not have mental capacity to make a will, that it was procured by undue influence, and was not executed and attested as required by statute, it constituted but *one* controversy and was not removable.

Judge BARNARD of the N. Y. Supreme Court has held in a case similar to the one at bar, Langdon vs. Fisk, "There is but one cause of action."

Judge CULLEN of the same Court, in that same cause, held the same. "I think that the complaint

states but one cause of action." And he decided that the attempted removal from the State Court was invalid and ineffectual *for that reason.*

Judge FREEDMAN of the N. Y. Superior Court vacated an order to remove a similar case on that ground (see order of July 5, 1883, in Langdon vs. Fogg).

Judge O'GORMAN of the N. Y. Superior Court held the same in Foster vs. Seymour, Oct. 25th, 1883.

In Connell vs. Utica, I. & E. R. Co., 13 Fed. Rep., 241, BLATCHFORD, J., holds that the decision of the State Court that the cause of action is entire "is a decision which it is proper for this Court (the U. S. Court) to *follow.*"

In Petterson vs. Chapman, 13 Blatchf., 397, the Court held that an action of trover against three defendants, two of whom were non-residents, could *not* be removed under § 2 of the Act of 1875, and say (p. 400): "It is suggested that the nature of the claim being for a conversion of personal property, and therefore maintainable against either defendant alone, is material. But to this it must be answered, *that the plaintiffs have the election to proceed in the same suit against all the defendants,*" and cite with approval Smith vs. Rines, 2 Sumn., 338, which holds that "in actions of tort the plaintiff may elect to make his actions joint, or several, and no defendant can take away that election."

This case is quoted as authority and expressly followed by Judge BLATCHFORD in Sawyer vs. Switzerland Mar. Ins. Co., 14 Blatchf., 451, and by Judge BENEDICT in Van Brunt vs. Corbin, 14 Blatchf., 496, and by Judge WALLACE in Clark vs. Opdyke, 10 Hun, 389, and seems fully established as the law of the Second Circuit.

And Tuedt vs. Carson, 13 Fed. Rep., 353, is to the same effect.

In Clark vs. Opdyke, 10 Hun, 387, which was a suit to remove three trustees, the Court say: "It seems very clear upon the case presented by the complaint, that the plaintiff has the right to prosecute the defendants jointly. * * * The trustees have a community of interest and of responsibility. It is the duty of each one to protect the trust property from the acts of his colleagues," and on p. 388, "whether the plaintiff is compelled to sue all jointly or may do so at his option, he has sued all jointly in this action. He has elected to treat the liability of the defendants as joint and against them jointly he seeks relief. There is not, therefore, a separate controversy between him and the defendant Opdyke, and the case is not within either of the classes provided for by the Act of 1875."

And this decision was followed by Judge WALLACE, when a motion was made in the U. S. Court to remand the case. See note at end p. 10 Hun, 389.

Merchants' National Bank vs. Thompson, 4 Fed. Rep., 876, holds that a suit brought to foreclose the equity of redemption in five shares of trust property, which were originally placed in plaintiff's hands at the same time, but one of which the pledger had subsequently sold to a citizen of another State, was not removable to the Federal Court as "it is the right of the plaintiff to have a single foreclosure of his single debt and mortgage."

So in this present case the corporation has the right to have a single determination of the fraud or misconduct of its trustees, in the original issue and payment of 199,989 shares of its capital stock.

Ex parte Pelby Law Rep., 21 Ch. Div., 492, holds that the liability of trustees is *joint*, when they by a joint arrangement have appropriated severally securities or funds belonging to the corporation.

Which is the averment of this complaint (fols. 13 and 16).

Ex parte Andrews and Mott, 40 Ala., 639, holds that under the Act of 1866 an action of trespass in the case against three persons for a conspiracy to defraud the plaintiff, is not removable by one who is a non-resident.

Vose vs. Yulee, 64 N. Y., 450, holds that one defendant cannot remove the action, "it being a claim against all the defendants upon a joint liability in equity," and yet, in that case, the action was so far separate that the Court sustained a judgment *in favor of all the other defendants*, and only ordered a new trial on behalf of the non resident defendant (see S. C., 50 N. Y., 369). The Act of 1866, under which that case was decided, was fully as favorable to the defendant's position as the Act of 1875.

Horsley vs. Bell, Ambler, 770, decides that acting commissioners appointed to make a brook navigable are each liable, though all were not present at each meeting.

Garner vs. Thorn, 56 How. Pr. R., 452, holds that averments of different acts are properly included in one bill, which acts were intended to defraud the plaintiff and in which all the defendants were more or less concerned though not jointly concerned in each act.

Bates vs. Plonsky, 62 How. Pr. R., 435, BARRETT, J., holds that a bill against a debtor and his general assignee and three of his judgment creditors, to enforce the plaintiff's lien upon goods of the debtor is not multifarious, "for the reason that a conspiracy between all the defendants is charged and the various devices which have been resorted to are but the details of a single scheme and a common purpose."

The cases above cited group themselves around four principles which they respectively sustain.

(1) That where the action is to enforce a trust, then although specific acts be charged against individual trustees, or specific relief is asked against individual trustees (*e. g.*, the removal of one), that does not constitute such an action as can be removed from the State Court.

Winchester vs. Loud, 2 Sup. Ct. Rep., 311, to be reported in 108 U. S.
Clark vs. Opdyke. 10 Hun, 387.

(2) That where a bill is filed to compel trustees to account, each is responsible for the acts of his co-trustees, and it is proper to call upon each to account for the profits he has made, that the Court may obtain information to enable it rightly to frame the final decree.

Spencer vs. Spencer, 11 Paige, 299.
People vs. Tweed, 5 Hun. 382.
Garner vs. Thorn, 56 How. Pr. R., 452.
Horsley vs. Bell, Ambler, 770.
Ex parte Pelby Law Rep., 21 Chan. Div., 492.

(3) That even in actions of *tort*, which are joint and several, the plaintiff has the right to elect to make them joint, and if he has done so, one defendant cannot deprive him of that election and treat it as several

Petterson vs. Chapman, 13 Blachf., 395.
Smith vs. Rines, 2 Sumn., 338.
Tuedt vs. Carson, 13 Fed. Rep., 353.
Ex parte Mott & Andrews, 40 Ala., 639.

(4) That raising separate issues by plea or answer (or otherwise) by different defendants, does not create separate controversies, if there is one principal controversy to be determined as to all.

Hyde vs. Ruble, 104 U. S., 409.
Fraser vs. Jennison, 106 U. S., 194.

Merch. Nat. Bank vs. Thompson, 4 Fed. Rep., 876.
Cooke vs. State Nat. Bank of Boston, 52 N. Y., 113.
Vose vs. Yulee, 64 N. Y., 450.

The R. S. of this State (vol. 1, pp. 558–9, Edmond's Edn.) make the defendants "jointly," as well as severally, liable "to the corporation" for such violations of its provisions as are charged in the complaint (fols. 15 and 16). And this branch of the controversy is sufficient to prevent the removal of the cause from the State Court.

Sixth Point.

The Court below sustained substantially the views submitted in this brief, as to the questions of law presented, saying at p. 47: "The controversy in suit is the one which is actually presented, not the one that might have been. It is not wholly between the plaintiff and one of the defendants, because it might have been if the plaintiff had so elected. Nor can a controversy be fully determined between a plaintiff and one of the defendants, when in the form and substance which it has assumed the plaintiff insists, and has a right to insist, that so far as he is concerned, it shall be determined as to both of the defendants."

This is acquiesced in by the appellee as a sound and clear statement of the law, as affecting this branch of his motion.

But the Court reaches the conclusion that in the complaint, the plaintiff "has elected to pursue each

defendant separately," stating, however, no ground for that conclusion except its opinion that, "Some of the transactions assailed by the bill are not joint transactions on the part of the defendants. All of the defendants may not be liable to the same extent. The prayer as to this branch of the bill is against each defendant for a several accounting, and that is only necessary upon the theory that some of them are liable for a different amount than others" (foot of p. 47).

The appellee contends that the above is an erroneous construction of his complaint, and that in fact he claims a "joint recovery against all the defendants" and has NOT elected to pursue each defendant separately, and submits the following considerations as to the reasoning of the opinion on this point.

I. The main point relied upon in the opinion and in the argument of counsel is that this clause is inserted in the prayer of the bill (p. 5). "That they "(the defendants) may also be severally adjudged "and decreed to account of and concerning the "sums of money, gains and profits received by "each from the sale of the stock of the defendant "corporation as aforesaid." And the Court say in their opinion: "That is only necessary upon the theory that some of them are liable for a different amount than others (p 47 at foot).

To this it is answered:

(*a*) That such an accounting forms the basis for a "*joint*" liability of *all* the trustees.

Spencer vs. Spencer, 11 Paige, 299.
People vs. Tweed, 5 Hun, 382.
Garner vs. Thorn, 56 How. Pr. R., 452.
Horsley vs. Bell, Ambler, 770.
Ex parte Pelby, Law Rep., 21 Chan. Div., 492.

The case of Spencer vs. Spencer, is emphatic

upon this point, holding that where all the trustees conspire to defraud the *cestui que trust*, each is liable for the acts and delinquencies of his co-trustees, and that the account must be taken against all although the decree may be for different amounts against different defendants.

The defendant Alley is liable for the profits made by his co-defendant Clews out of stock which they conspired together to place in Clews' hands, in violation of their duties as trustees of the corporation; and Clews is liable for the profits Alley made. And this prayer is merely to inform the Court what such profits were, to enable it properly to frame its final decree. The prayer is not that Alley pay over his individual gains and no more, as seems to be erroneously assumed.

That this is the proper construction of this clause of the prayer is made more obvious by the succeeding clause, "That the value of the property conveyed to said defendant corporation, to be determined by this Court, be credited on such accounting as may be just" (p. 5). And this establishes two facts (1) That only one general accounting ("such accounting") was contemplated or asked for; (2) That upon "such" accounting the value of the property was to be credited, which it could not be in favor of separate defendants, but only of the trustees jointly.

(*b*) An equity decree, though it declares that individual defendants perform individual acts or pay different sums, is properly a single decree made in one suit.

Cases above cited under (*a*), particularly
56 How. Pr. R., 452; and
Brinckherhoff vs. Brown, 6 John. Ch., 139.
Pfohl vs. Simpson, 74 N. Y., 142.

The decree prayed for in this case falls clearly within the decision of Winchester vs. Loud.

(*c*) The prayer for relief is not a substantial part of the complaint. It is not demurrable. It may be rejected or modified as the averments or facts may require.

Mackey vs. Auer, 8 Hun, 180.
Harris vs. Hollister, 64 N. Y., 4.
Garner vs. Thorn, 56 How. Pr. R., 457.

And yet by this opinion the prayer is made the pivotal and most important part of the bill, controlling all its other parts.

II. The other point stated in the opinion that "Some of the transactions assailed by the bill are not joint transactions on the part of the defendants" must refer to the twelfth clause (p. 4): "that the individual defendants have individually received large gains from the sale of that portion of the stock turned over to them individually by the vendor as hereinbefore stated."

But it is contended on the part of the plaintiff that these are transactions for which *all* the defendants, as conspiring and corrupt co-trustees, are liable, and that the allegations as to them do no more than lay the foundation to compel *all* to answer for these profits (see cases under Subd. 1, *supra*), or at most to raise "questions in regard to one controversy, to wit., the trust," under the decision in Winchester vs. Loud.

The appellant Alley cannot therefore separate this "question" as to his "gains" from the controversy, as to the trust, and as to the liability of all for the corrupt acts of each other.

Moreover, exactly such, or similar averments have been held proper in bills against trustees.

Spencer vs. Spencer, 11 Paige, 299.
Garner vs. Thorn, 56 How. Pr. R., 452.

Winchester vs. Loud, 2 Supr. Ct. Rep., 311, to be reported in 108 U. S.
Bates vs. Plonsky, 62 How. Pr. R., 435.

III. The other point is stated in the opinion that "All of the defendants may not be liable to the same extent."

To this it is answered:

(*a*) Under the allegations of the bill all would be liable to the same extent, *i. e.*, for all the gains and profits, each had made by reason of their joint corrupt action.

(*b*) Even if that was not so, still the amount of liability of each trustee is a mere incident. The "controversy" is as to the trust, and as to the corrupt and fraudulent acts of the defendants jointly in regard to it.

Seventh Point.

The reliance of the appellant is upon the following cases:

Clark vs. Chic. R. R. C., 11 Fed. Rep., 355; Kerbug vs. Cotzhausen & als., 16 Fed. Rep., 705, in both of which it was held that in actions for torts one defendant can remove the cause to the Federal Courts.

As to these cases it is submitted:

(1) The same question was decided differently by the U. S. Circuit Court in Tuedt vs. Carson, 13 Fed. Rep., 353, the Court holding in a care-

fully written opinion that such an action was *not* removable.

And in

Petterson vs. Chapman, 13 Blatchf., 395 (approved by Judges BLATCHFORD, WALLACE and BENEDICT).

And in

Smith vs. Rines, 2 Sumn., 338. In *Ex parte* Andrews & Mott, 40 Ala., 639.

And in

Gudger vs. W. N. C. R. R. Co., The Reporter, vol. 16, p. 705.

And it is to be observed that in 16 Fed. Rep., 705, the Court dispose of the question in a very summary manner, without discussing authorities or seeming to know of Tuedt vs. Carson, which had been decided a year previously, or Pettersen vs. Chapman, which had been decided in 1876 and reported in 1877.

(2) The analogy between a *tort* and a *breach of trust* is very remote, but that is all the analogy the defendants claim in these cases.

On the other hand, we cite three cases in which actions *identically* the same as this have been held not susceptible of removal (Langdon vs. Fisk, CULLEN, J., Langdon vs. Fogg, FREEDMAN, J., and Foster vs. Seymour, O'GORMAN, J.), and also the cases cited *supra*, such as Winchester vs. Loud, 2 S. C. R., 311, and Clark vs. Opdyke, 10 Hun, 387, which hold explicitly that an action against trustees for *breach of trust* is *not* removable. And the other cases cited *supra*, such as Langdon vs. Fisk, BARNARD, J.; Spencer vs. Spencer, 11 Paige, 299; Garner vs. Thorn, 56 How. Pr. R., 452; and *Ex parte* Pelby, Law. Rep. 21, Chan. Div., 492, are cases against trus-

tees, and furnish direct analogies to substantiate their *joint* liability.

This action is for *breach of trust*, not for a *tort*.

Eighth Point.

The order remanding the cause to the State Court should be affirmed upon both the grounds upon which it is made.

It is, however, sufficient to sustain the order if either be valid.

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